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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1390

JOHN PAUL JONES AND RUTH J. RUBEL JONES,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, John Paul Jones and Ruth J. Rubel Jones, pray that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit, which Court, on appeal from the verdict and judgment against Petitioners in the United States District Court for the District of Kansas holding Petitioners liable to repay as ordinary income taxes erroneously refunded as entitled to the capital gains deduction, affirmed said judgment for repayment against Petitioners.

A timely Petition for Rehearing was filed and by the Court of Appeals overruled.

This suit involves income taxes of Petitioners for the years 1956 and 1957, and the judgment was for the principal sum of $86,081.29.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in ..... F. 2d ..... and appears in the appendix to this Petition as Appendix A, page A1.

The joint petition for rehearing of Petitioners appears in the appendix to this Petition as Appendix D.

The judgment of the United States Court of Appeals to be reviewed was entered on December 4, 1967, and Petitioners' joint petition for rehearing was overruled on February 2, 1968, and appears in the appendix to this Petition as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1254(1) and Section 7482 of the Internal Revenue Code (Title 26, Sec. 7482, U.S.C.)

QUESTIONS PRESENTED

1. **Whether This Court Should Grant Certiorari to Review the Important and Recurring Question, Important to Administration of Federal Income Tax Law, Never Decided by This Court and the Subject of Conflicting Opinions of the Courts of Appeals, As to the Income Tax Liability of the Seller of a Business Developed Over Twenty Five Years for a Lump-Sum Price, Substantially on Deferred Payments, Where There Is a Covenant by Seller Not to Compete but Where the Parties and the Sale Agreement Made No Effort to and Did Not Consider Allocation of Said Total Purchase Price Among the Other Assets and Said Covenant.**

Annabelle Candy Co. v. *Commissioner of Internal Revenue*, 9 Cir., 314 F.2d 1, 3.

Commissioner of Internal Revenue v. *Killian*, 5 Cir., 314 F.2d 852, 854.

Levine v. *Commissioner of Internal Revenue*, 324 F.2d 298, 299.

District of Columbia v. *ACF Industries, Inc.*, (D.C. App.) 350 F.2d 795, 798

Fulton Container v. *United States*, 9 Cir., 355 F.2d 319, 325.

Delsea Drive-In Theatres, Inc., v. *Commissioner of Internal Revenue*, 3 Cir., 379 F.2d 316, 317.

2. The Court of Appeals Erred in Applying an Erroneous Theory of the Law That the Sale of a Property and Business Which Would Produce Income Could Not Qualify As a Capital Asset to the Seller, Bringing This Opinion into Conflict with Applicable Decisions of the Second, Third, Fifth and Sixth Circuits.

Jaglom v. *Commissioner of Internal Revenue*, 2 Cir., 303 F.2d 847, 848.

Ayrton Metal Co. v. *Commissioner of Internal Revenue*, 2 Cir., 299 F.2d 741, 748.

United States v. *Dresser Industries*, 5 Cir., 324 F.2d 56, 59.

Turzillo v. *Commissioner of Internal Revenue*, 6 Cir., 346 F.2d 884, 889 (1).

3. The Decision Below of the Tenth Circuit Conflicts, Not Only with Applicable Decisions of This Court, but with the Applicable Decisions of the Courts of Appeals of the Second, Fifth and Ninth Circuits, in Holding the Sale of a Going Business with Assets in Part of Capital Assets, Including Good Will and Property Which Would Produce Income, May Be Subjected to Ordinary Income Treatment As a Whole When There Is No Evidence the Parties Allocated or Gave Any Consideration to Allocating the Purchase Price to Particular Assets at the Time They Entered into the Agreement Here Involved.

Watson v. *Commissioner of Internal Revenue*, 345 U.S. 544, 552, 73 S. Ct. 848, 853.

Commissioner of Internal Revenue v. *Chatworth Stations, Inc.*, 2 Cir., 282 F.2d 132, 135.

Annabelle Candy Co. v. *Commissioner of Internal Revenue*, 9 Cir., 314 F.2d 1, 8.

4. The Decision of the Court of Appeals Is in Conflict with Applicable Decisions of the Courts of Appeals for the Second and Fifth Circuits in Holding a Covenant Not to Compete So Closely and Personally Related to a Sale of Good Will That It Fails to Have Any Independent Significance Apart from Merely Assuring the Effective Transfer of the Good Will Must Be Treated As Ordinary Income for Tax Purposes.

Barran v. *Commissioner of Internal Revenue*, 5 Cir., 334 F.2d 58, 62.

Ullman v. *Commissioner of Internal Revenue*, 2 Cir., 264 F.2d 305, 307.

5. The Court of Appeals Erred in Applying an Erroneous Theory of the Law That Where There Was No Fragmentation or Allocation of the Purchase Price by the Parties at the Time of the Execution of the Agreement, the Whole Must Be Treated As Ordinary Income for Tax Purposes, When under the Established Law under Such Circumstances the Whole Must Be Treated As Capital Assets.

Commissioner of Internal Revenue v. *Chatworth Stations, Inc.*, 2 Cir., 282 F.2d 132, 135.

Annabelle Candy Co. v. *Commissioner of Internal Revenue*, 9 Cir., 314 F.2d 1, 8.

General Guarantee Mortgage Co. v. *Tomlinson*, 5 Cir., 335 F.2d 518, 520.

Bisbee-Baldwin Corp. v. *Tomlinson*, 5 Cir., 320 F.2d 928, 935.

6. The Court of Appeals Erred in Applying an Erroneous Theory of the Law in Holding the Mere Purpose of Minimizing or Avoiding Taxes Which Might Otherwise Accrue Required Ordinary Income Tax Treatment, Even Though, As Here, There Is a Legitimate Business Purpose and Reasonable Expectation of Gain Apart from the Tax Savings.

Nassau Lens Co. v. *Commissioner of Internal Revenue*, 2 Cir., 304 F.2d 39, 45.

Gilbert v. *Commissioner of Internal Revenue*, 2 Cir., 248 F.2d 399, 405.

Gregory v. *Helvering*, 293 U.S. 465, 469, 55 S. Ct. 266, 267.

Knetsch v. *United States*, 364 U.S. 361, 81 S. Ct. 132, 134.

STATEMENT OF THE MATTER INVOLVED

About the year 1927, petitioner, Mrs. Ruth J. Rubel Jones (then Ruth J. Rubel, a single woman), began a development of her own insurance agency in Kansas City, Missouri, specializing in professional and association group insurance for teachers and related personnel. Mrs. Jones was the pioneer in this special field. She began this development with Missouri teachers groups followed with custodian groups and other similar groups.

Master group insurance policies were issued for each of these groups.

About the year 1936, Mrs. Jones began writing some of her business through Continental Casualty Company and by 1941 almost all of the agency's business was written through that company. Continental was the insurance underwriter used by Mrs. Jones' agency for the hospital, accident and income continuation coverage on all the teachers groups.

Mrs. Jones founded her agency prior to her marriage to John Paul Jones. It was organized and operated by her as a sole proprietorship from its inception in 1927 until its sale to Forrest T. Jones in 1953. The agency was expanding and prosperous, enjoying a growth in premiums written from $188,353.00 in 1942 to a premium gross of $307,747.45 in 1952. During the first eight months of 1953, the year of the sale, the premium income of the agency was $282,442.45.

More than ninety percent of the agency's premium income was derived from the association group insurance which Mrs. Jones had developed. During all the time material to this litigation the agency was entitled to 22 1/2 percent of those group premiums as its share. Expressed in dollars and cents the agency's commissions for the first eight months of 1953 was $62,802.61. Sometime in the early part of 1953, Mrs. Jones became interested in establishing a teachers group insurance plan for the island of Puerto Rico and began thinking about selling her existing business, the Ruth J. Rubel Agency in Kansas City.

Shortly after she had advised Continental that she might sell her agency, a former employee of Continental and personal friend of some of the chief officials of that company, named Forrest T. Jones, approached petitioner on the purchase of the Ruth J. Rubel Agency. On first contact, petitioner told him it would require over $400,000.00 to purchase the agency, having in mind that she would not take less than $300,000.

About six months later, in the middle of June, 1953, Forrest Jones met petitioner in the Continental Casualty offices. Forrest Jones stated that if Mrs. Jones would sell her agency for a down-payment and payments geared to a percentage of premiums of business written through the

agency, he would be able to purchase it. As it was necessary to obtain approval of Continental for such a transaction, Forrest Jones and petitioner met with Mr. J. Milburn Smith, Executive Vice President of Continental at which time Continental agreed to loan Forrest Jones $50,000.00 for the down-payment plus $5,000 additional for personal expenses. Continental suggested it would collect the deferred payments and send them to petitioner with a periodic accounting.

As a rule, it was agreed that Mrs. Ruth J. Rubel Jones would sell her insurance agency to Forrest T. Jones for a downpayment of $50,000.00 plus an amount equal to five percent of the premiums on insurance written by the agency or Forrest Jones for a period of ten years; Continental wanted Forrest Jones to acquire this agency and he could buy it in no other way; that the five percent would be sent by the agency to Continental Casualty Company to hold and distribute to petitioner periodically; that Forrest T. Jones would guarantee the petitioner that the five percent would be not less than $15,000.00 per year and that if they did not equal that amount for three consecutive years, the agency would be subject to forfeiture.

The sale was consummated through a series of financial transactions involving four parties with their correspondent interest in the business. The first instrument, defendant's Exhibit A, was entitled "AGREEMENT AND BILL OF SALE" wherein petitioner Ruth J. Rubel Jones sold and transferred to her wholly owned corporation, Ruth J. Rubel Agency, Inc., all the assets of said agency.

Exhibit B is entitled "AGREEMENT TO ASSIGNMENT". This instrument constituted an agreement by Continental to the transfer of the Agency Commission Contracts by Ruth J. Rubel (now Jones) to the corporation, Ruth J. Rubel Agency, Inc.

Exhibit C is entitled "AGREEMENT OF SALE". This instrument constitutes the sale of all the capital stock of the Ruth J. Rubel Agency, Inc. to Forrest T. Jones for a purchase price erroneously stated to be $25,000.00 but thereafter corrected to show the true amount of cash down payment to be $50,000.00. It also contained a covenant not to compete and prohibited him from selling or encumbering said business.

Exhibit D is entitled "AMENDMENT TO AGENCY CONTRACTS AND COMMISSION AGREEMENTS". This was an agreement between the corporation, Ruth J. Rubel Agency, Inc., and Continental agreeing generally to a reduction in the commission to be paid the agency of five percent straight across the board. This provision was never activated in Continental's Basic Records.

Exhibit E entitled "AGREEMENT". This instrument is an agreement between Continental and petitioner, Ruth J. Rubel Jones, providing that she should act and serve as consultant for Continental as requested, for which she was to receive for said services a sum equal to five percent of the premiums on insurance written through Continental by Forrest T. Jones or Ruth J. Rubel Agency, Inc. The payments were to continue regardless of the agent's inability or incapacity to fulfill her obligations and regardless of her death provided she should perform satisfactory service for a period of two years (the period Continental considered necessary to wean away her customers (Tr. 637)), said sums to be paid the agent if living and if deceased, to be paid to her personal representative. The agreement was to continue for a period of ten years. It requires a strained construction to call this a personal service contract.

Exhibit F is entitled "AGREEMENT". This instrument is a contract between Ruth J. Rubel Jones and For-

rest T. Jones which recites that the parties understood the petitioner Ruth J. Rubel Jones would not have entered into this sales agreement without the simultaneous agreement entitling her to receive an amount equal to five percent of the premiums. It further provided that Forrest T. Jones guaranteed second party should receive not less than $15,000.00 per year.

Defendant's Exhibit G is entitled "AMENDMENT TO AGREEMENT OF SALE" merely corrects the original contract to show the correct down payment to be $50,000.00 rather than $25,000.00 as erroneously stated previously.

The result of these transactions was as follows: Forrest T. Jones became the owner of the Ruth J. Rubel Agency, Inc., valued at $300,000.00 or more and with an annual net income of over $60,000.00 a year, with all its assets and business; the Ruth J. Rubel Agency, Inc., entered into a voluntary reduction in its contract with Continental reducing the commission it should receive from Continental by five percent across the board so as to provide the five percent necessary to pay Mrs. Jones her five percent installments on the purchase price. It cost Continental nothing. The five percent of the premiums received by Mrs. Jones was the money of Forrest T. Jones paid by Continental through the five percent withheld from Forrest Jones. Mrs. Jones was never expected to, never asked to perform and never performed any services as consultant for Continental. It was never intended that she should. (Tr. 626, 627, 635, 637) The purpose of Continental in requiring Mrs. Jones to agree to be available for consultation was for the sole purpose of pinning her down so as to keep her from competing in any manner, shape or form with Ruth J. Rubel Agency, Inc., or Continental and with no intention of utilizing her services. (Tr. 626, 627, 635, 637)

These transactions had a legitimate business purpose and produced a lawful result.

There was no attempt by the parties to allocate the different agency assets for tax purposes. After the sale of stock to Forrest Jones, Mrs. Jones continued to maintain an office at the offices of Ruth J. Rubel Agency, Inc., until January, 1959. During the first two years she assisted in every way she could to introduce Forrest Jones to the agency clients and familiarize him with the operation of that type business as is customary in the sale and transfer of a going business, although she was not bound by contract to give him assistance following the sale.

During the years 1954, 1955, 1956, 1957, and 1958, joint returns of Petitioners were filed, erroneously as we claim, reporting the payments from Continental as ordinary income. In 1959, petitioners filed claims for refund for the years 1956-1957 claiming long term capital gains. The Internal Revenue Service found petitioners were entitled to long term capital gains and refunded the excess tax. The payments forwarded to Mrs. Jones by Continental have always been recorded on Continental's books as agency commissions (as well they might since they were Forrest Jones' commissions paid to Mrs. Jones at his direction). Continental reported such payments to Mrs. Jones to the authorities as agency commissions.

The United States authorities reversed themselves and in July, 1963, brought this action for return of the refunded tax money claiming it to be taxable as ordinary income on the money paid Mrs. Jones under her contract with Forrest Jones.

The verdict and judgment went against petitioners in the trial court and the court of appeals affirmed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Whether This Court Should Grant Certiorari to Review the Important and Recurring Question, Important to Administration of Federal Income Tax Law, Never Decided by This Court and the Subject of Conflicting Opinions of the Courts of Appeals, As to the Income Tax Liability of the Seller of a Business Developed over Twenty Five Years for a Lump-Sum Price, Substantially on Deferred Payments, Where There Is a Covenant by Seller Not to Compete But Where the Parties and the Sale Agreement Made No Effort to and Did Not Consider Allocation of Said Total Purchase Price Among the Other Assets and Said Covenant.

There was in this case a covenant by the seller not to compete for a period of ten years.

The purchase price was an over-all or lump-sum amount with no attempt by the parties at the time of execution of the agreements to allocate or fragment the purchase price to any particular asset.

Petitioners erroneously, as we believe, paid ordinary income tax on these payments for awhile, and then realizing their mistake filed for refunds. The Income Tax Authorities agreed and refunded such over-paid taxes. Then the tax authorities reversed themselves and brought this suit for return of the refunded tax money.

The good will and capacity of this business to produce income were capital assets conveyed in the sale.

The Trial Court and Court of Appeals held all deferred payments were ordinary income and subject to tax as such.

This is a recurring question as to which this court has never ruled so far as we have found. The Courts of Appeals decisions are in conflict on this issue.

In the case of *Annabelle Candy Co.* v. *Commissioner of Internal Revenue,* 9 Cir., 314 F.2d 1, the Court said (l.c. 3):

> "The agreement provided for a total consideration of $115,000.00 to be paid in installments to Sommers by taxpayer. Sommers agreed, *inter alia,* to deliver his fifty percent stock interest, to retire from active participation as an officer and director, and not to compete nor engage in any activities which might be prejudicial to taxpayer's business for a period of five years."

The Court stated (l.c. 3):

> "No separate or severable consideration was bargained for, or paid, for the covenant not to compete contained in the agreement of May 15, 1956."

That suit was by the purchaser and because it failed to sustain its burden of proof that notwithstanding the lack of any recital to the effect in the agreement that the parties intended to allocate consideration to the covenant the judgment against it was affirmed.

In the case of *Commissioner of Internal Revenue* v *Killian,* 5 Cir., 314 F.2d 852, the suit was by the seller of a partnership engaged in the insurance business. The Court there said (l.c. 854):

> "The Commissioner urged before the Tax Court, and again here, that the $12,500 was not gain from the sale or exchange of a capital asset, contending that this amount was received for anticipated future renewal commissions and/or as a separate item for the covenant not to compete contained in the agreement of 1954.
>
> * * *
>
> In Kenney v. Commissioner, 37 T. C. 1161, the Court said: 'The evidence is clear and uncontradicted that neither Edwards nor Educators placed any independent value on the covenant not to compete, and we can ascribe none to it.' See also Brooks v. Commissioner, 36 T. C. 1128 (1961)."

In the case of *Levine* v. *Commissioner of Internal Revenue*, 3 Cir., 324 F.2d 298, suit was brought by the seller of an oil business. The seller contended that the covenant not to compete was simply an integral part of the contract and not an independent arrangement with independent consideration being paid for it. The Court there said (l.c. 299):

> "At his first meeting with the owners in September, 1956, Dubrovsky testified that he, for the partnership, gave Katz a price of $85,000-$50,000 for the real estate and personal property and $35,000 for the good will or gallonage."

The Court there held (l.c. 299):

> "The Tax Court found as to the $35,000, that 50% thereof was paid to petitioners for the good will of the partnership, Economy Oil and Supply Co., and 50% for the covenant not to compete entered into by them at the time of the sale. In accordance with that finding the court held, 'The 50 percent attributed to the sale of goodwill will be treated as long-term capital gain and the 50 percent attributed to the covenant not to compete will be treated as ordinary income in a computation under Rule 50.'"

In the case of *District of Columbia* v. *ACF Industries, Inc.*, (Ct. App., D. of C.) 350 F.2d 795, the Court in following the federal rule said (l.c. 798):

> "Since no countervailing policies appear in this case, we adhere to the federal rule that where an entire business is sold it is to be treated, not as a unit, but as an aggregation of its assets.
>
> [3, 4] Under this rule, the total purchase price must be apportioned among the assets of the business, assigning to each asset an amount related to reasonable market value at the time of the sale. But in this case,

the record shows no such apportionment, or even a plausible basis for such apportionment. The total purchase price was never disclosed."

* * *

"[5, 6] Ordinarily, since the taxpayer bears the burden of establishing his claim for refund, inadequacies in the record will result in judgment in favor of the District. In this case, however, each side carried some burden because of the District's change in position after the petition had been filed. Since the record cannot sustain the contentions of either party, we deem it best to vacate the judgment of the Tax Court and remand the case for new trial in which the guidelines set forth herein can be applied."

The Court remanded the case for such allocation, saying (l.c. 799):

"If the parties to the sale have allocated the value by agreement, the practice followed in federal cases of giving great weight to that allocation should be followed. In cases where there is no allocation by agreement, the proper allocation can be made only by considering the 'circumstances of the business as a whole in the light of its history up to the time of the transfer date * * *.'"

In that case there does not appear any attempt by the parties to fragment or allocate the purchase price to the separate assets.

In the case of *Fulton Container* v. *United States*, 9 Cir., 355 F.2d 319, suit was brought by the seller for tax refund in connection with the sale of a business. There was a covenant not to compete and a certain sum was allocated "for the personal property and agreement not to compete." The Court there said (l.c. 325):

"[3] The key to the determination of the value of a covenant not to compete is the intent of the parties

at the time of the execution of their agreement. Annabelle Candy Co. v. Commissioner, 314 F.2d 1 (9th Cir. 1962). Here, while the taxpayer may have failed to prove that which the parties intended as the value of the covenant or its exact, actual worth, it did offer sufficient evidence to prove that it was not intended that it was valued at $250,000.00. Furthermore, there is uncontradicted evidence that it was not in fact worth $250,000.00.

The first indication of intent at the time of the agreement is found in the agreement itself, where the parties assigned no specific value to the covenant. In Annabelle Candy Co., supra, Judge Barnes, for our court, wrote that the failure to assign a value to the covenant in the contract is 'pretty good evidence that no such allocation was intended [although] it is not conclusive on the parties as would be the case if there had been an express affirmance or disavowal in the agreement.' 314 F.2d at 7; see also Rinehart Oil News Co., P-H Tax Ct. Mem. Sec. 65,178, 6-29-65. It is true that the covenant was discussed at length by the parties during their negotiations, but it is also quite apparent from the entire record that allocation of a particular value to the covenant was not discussed, nor were the tax consequences."

In the case of *Delsea Drive-In Theatres, Inc.*, v. *Commissioner of Internal Revenue*, 3 Cir., 379 F.2d 316, the purchaser of corporate stock of a business corporation with a covenant not to compete. Purchaser claimed income tax deductions assessed against him as ratable portions of consideration of a covenant not to compete. The Court there said (l.c. 317):

"We will assume, as did the Tax Court in substance, that Delsea was entitled to the benefits of the agreement not to compete.

[1, 2] The Tax Court concluded that the petitioner did not intend to allocate any portion of the $175,000

to the agreement not to compete and was thus not entitled to the deductions. The Court reached this conclusion from the absence of any mention of the agreement not to compete in the stock purchase agreement and from the lack of any stated monetary consideration in the agreement not to compete. Since the absence of such facts from the record is not conclusive, United Finance and Thrift Corp., 31 T.C. 278; aff'd 282 F.2d 919, 922 (4 Cir.), cert. denied 366 U.S. 902, 81 S.Ct. 1045, 6 L.Ed.2d 202 (1960), the Tax Court examined the record as a whole and found nothing inconsistent with its conclusion. As it points out in its opinion, although the parties may have considered the agreement not to compete to be valuable, ' "if the parties did not intend that a part of the purchase price be allocated to * * * [an] important and valuable covenant, that intention must be respected." Anabelle [Annabelle] Candy Co. v. Commissioner, 314 F.2d 1 [7] 9 Cir. 1962.' "

In the case at bar the petitioners as seller have been held liable for all deferred payments on the purchase price of their business in a situation where the business was sold as a single unit with no allocation or fragmentation. Such ruling is in conflict with all the above authorities.

This is a recurring question. *Cammarano* v. *United States,* 358 U.S. 498, 79 S.Ct. 524, 526.

2. In Holding the Sale Consideration Was Here Paid for the Right to Receive Future Income, Not for Increase in the Value of Income-Producing Property the Court Erred in Applying an Erroneous Theory of Law.

Petitioners here had an asset, a property which would produce income. The value of such property was built up by Mrs. Jones over a period of twenty-five years. The transaction here was the present sale of the future right to earn income. The sale here was that of an "income producing asset and the income which it produces." That is a capital asset.

In the case of *Jaglom* v. *Commissioner of Internal Revenue,* 2 Cir., 303 F.2d 847, the Court stated the law as follows (l.c. 848):

> "A distinction has arisen between an income-producing capital asset and the income which it produces. Gains arising from the sale of such an asset which has appreciated in value are capital gains, but gains flowing from the sale of an accrued right to collect the income from such an asset are not. Thus the right to collect ordinary income is not transmuted into capital gain by its sale. See, e. g., Hort v. Commissioner, 313 U.S. 28, 31, 61 S. Ct. 757. 85 L. Ed. 1168 (1941); Commissioner v. P. G. Lake, supra, at 266, 78 S. Ct. 691. If both the income producing asset and the right to accrued income from the asset are sold together, the purchase price must be allocated between the two, only the former being a capital asset."

In the case of *Ayrton Metal Co.* v. *Commissioner of Internal Revenue,* 2 Cir., 299 F.2d 741, in reversing the tax court the Court said (l.c. 748):

> "[2] The Tax Court put misplaced reliance upon the fact that 'the payments were based on and measured by the purchase and sale of ore in the conduct of an ore selling business.' The fact that payment for a capital asset is measured in terms of income or profits does not necessarily change the payments into ordinary income. See Burnet v. Logan, 1931, 283 U.S. 404, 51 S. Ct. 550, 75 L.Ed. 1143; Williams v. McGowan, 2 Cir., 1945, 152 F.2d 570, 572, 162 A.L.R. 1036; Helvering v. Smith. 2 Cir., 1937, 90 F.2d 590; Hill v. Commissioner, 1 Cir., 1930, 38 F.2d 165, cert. denied, 281 U.S. 761, 50 S. Ct. 460, 74 L. Ed. 1170; Estate of Raymond T. Marshall, 20 T.C. 979 (1953). As a matter of fact, how else could the value of Ayrton's interest in the joint venture be sensibly computed? The price of antimony had fallen, and it was uncertain whether or not any future purchases from the Chur-

quini mine would be made, and if made, whether or not they would be profitable. To pay Ayrton 'in accordance with the profit realized' is a most reasonable way to fix an amount to be paid for Ayrton's interest in the joint venture. The provision that 2% of the contract purchase price of any purchases was to be the minimum payment does not change the basic character of these payments to that of ordinary income. Nor is the fact that these payments were referred to as a 'commission' persuasive, see Nordberg Mfg. Co. v. Kuhl, 7 Cir., 1948, 166 F.2d 331; Estate of Raymond T. Marshall, supra; George James Nicholson, 3 T.C. 596 (1944), that term merely served as a convenient label to describe the payments."

In the case of *Rosen* v. *United States*, 3 Cir., 288 F.2d 658, the Court stated the law as follows (l.c. 661):

"[4, 5] These cases exemplify what Circuit Judge Kalodner, speaking for this court, has accurately characterized as the 'general rule * * * that a right to receive ordinary income, produced by a capital asset, is not transmuted into a capital asset by the sale or assignment of the capital asset together with the right to receive the ordinary income.' Tunnell v. United States, supra, 259 F.2d at page 919."

The court erred in holding that consideration was here paid for the right to receive future income, not for increase in the value of the income-producing property. In so ruling the court brought this opinion into conflict with the opinion of the Fifth Circuit in the case of *United States* v. *Dresser Industries, Inc.*, 5 Cir., 324 F.2d 56, where the court said (l.c. 59):

"As a legal or economic position, this cannot be so. The only commercial value of any property is the present worth of future earnings or usefulness. If the expectation of earnings of stock rises, the market value of the stock may rise; at least a part of this increase

in price is attributable to the expectation of increased income. The value of a vending machine, as metal and plastic, is almost nil; its value arises from the fact that it will produce income.

[2] At common law, the right to receive income from land was ownership of the land. Lord Coke said: 'If a man seized of land in fee by his deed granteth to another the profits of these lands, to have and to hold to him and his heirs, and maketh livery *secundum forman chartae*, the whole land itself doth pass. *For what is land but the profits thereof?*' Co. Lit. 45. [Emphasis added].

There is, in law and fact, a vast difference between the present sale of the future right to *earn* income and the present sale of the future right to *earned* income. If an asset will not in the future be useful, or capable of earning income, it is worthless in the business world.

[3, 4] We conclude, therefore, that the sale was not merely the present sale of the right to earned income, to be paid in the future. Taxpayer had an asset, a right, a property which would produce income. The fact that the income which *could* be earned would be ordinary income is immaterial; such would be true of the sale of all income-producing property. See Commissioner v. Ferrer, 1962, 2 Cir., 304 F.2d 125, especially the discussion beginning in the last paragraph on page 132 [304 F.2d on page 132]."

It is likewise in conflict with the Second Circuit in the case of *Commissioner of Internal Revenue* v. *Ferrer*, 2 Cir., 304 F.2d 125, 132-3 (6, 7); and with the Sixth Circuit in the case of *Turzillo* v. *Commissioner of Internal Revenue*, 6 Cir., 346 F.2d 884, 889 (1).

3. The Covenant Not to Compete Is So Closely and Personally Related to the Sale of Good Will That It Fails to Have Any Independent Significance.

The Continental Casualty Company's contract with defendant Ruth J. Rubel Jones purporting to provide for her employment in reality and effect amounted only to a covenant not to compete. It provides:

> "The sums herein agreed to be paid by Continental shall continue to be paid regardless of the agent's inability or incapacity to fulfill her obligations hereunder stated and regardless of her death, provided that such obligations have been satisfactorily performed by the agent for a period of two years from the date hereof and prior to any such inability, incapacity or death. Such sums shall be paid to the Agent, if living, and if deceased to her personal representative."

The evidence that Mrs. Jones was never expected to, was never called upon to, and in fact never did act as consultant for Continental stands uncontradicted on this record. (Tr. 314, 315, 631, 573)

Mr. J. Wilburn Smith, Vice President of Continental testified (Tr. 626):

> "QUESTION: And what services did you expect to receive out of Mrs. Rubel?
>
> "ANSWER: Well, I wasn't so concerned about the services as I was—I was not concerned on the positive side, I was concerned on the negative side. I was concerned what she would do to destroy the business rather than what she would do to preserve it."

(Tr. 627:)

> "QUESTION: What were you concerned about with respect to Continental?
>
> "ANSWER: Well, the nature of this business is such that the person who creates it has control over

it, so that if that person desires to place it with another company, it's not a difficult job for them to accomplish it."

He took no part in discussing this contract with Mrs. Jones he said: "I avoided her as much as I could." (Tr. 630)

As the money to be paid Mrs. Jones was coming out of Forrest T. Jones, Continental was not interested in the amount of his commission to be diverted to Mrs. Jones.

Mr. Paul S. Fisher, then head of the Accident and Health Department of Continental testified (Tr. 635):

". . . other people in the company. I don't recall negotiating or having anything to do with the 'negotiation of her contract as a consultant or of the fee directly with her.

* * *

There might have been some dickering before the contract was drawn but I have no knowledge of it.' "

(Tr. 637:)

"I might have suggested to Mel Smith that retaining her as a consultant would be a good idea, but I didn't go into any definite terms as to the fee or length of time. We were interested primarily in about the first two years."

In the case of *Barran* v. *Commissioner of Internal Revenue*, 5 Cir., 334 F.2d 58, the Court said (l.c. 62):

"The generally accepted test for covenants of this type, however, is not as simple as that suggested by taxpayers. It is, rather, whether 'the covenant is so closely related to a sale of good will that it fails to have any independent significance apart from merely assuring the effective transfer of that good will.' Ullman v. Commissioner, supra, 264 F.2d at 307-308."

Here while there was a corporate entity involved, it was a wholly owned corporation of the covenantor and did not isolate the originator and holder of the good will from the covenantee.

In the case of *Ullman* v. *Commissioner of Internal Revenue*, 2 Cir., 264 F.2d 305, the Court said (l.c. 307):

> "[3] It is well established that an amount a purchaser pays to a seller for a covenant not to compete in connection with a sale of a business is ordinary income to the covenantor and an amortizable item for the covenantee unless the covenant is so closely related to a sale of good will that it fails to have any independent significance apart from merely assuring the effective transfer of that good will."

See also on this point the cases cited in footnote 3 to this quotation.

In the case of *Masquelette's Estate*, 5 Cir., 239 F.2d 322 the Court said (l.c. 326):

> "[3] Finally, it seems to be conceded by the Government, as indeed it must, under the authorities, that if the agreement not to compete is a non-severable part of the conveyance of good will, then the entire purchase price is to be treated as having been paid for good will. This is precisely what the Tax Court held in Toledo Newspaper v. C. I. R. supra, and it is the effect of the subsequent holding of the Tax Court in Toledo Blade Co. v. C. I. R., supra."

In the case of *Levine* v. *Commissioner of Internal Revenue*, 3 Cir., 324 F.2d 298, the Court said (l.c. 300):

> "There is no real controversy concerning the applicable law. If the covenant before us is so closely related to the good will sold by petitioners to Katz '* * * that it fails to have any independent significance apart from merely assuring the effective transfer of that good

will, * * * the covenant is regarded as nonseverable and as being in effect a contributing element to the assets transferred.'"

In the case of *Nelson Weaver Realty Co.* v. *Commissioner of Internal Revenue*, 5 Cir., 307 F.2d 897, the facts were analogous to the facts here. The court there said (l.c. 899):

"[1] The Commissioner held with the approval of the Tax Court and the Government now argues, that the income derived from the deal between Mortgage Company and Cobbs-Allen was not subject to capital gains treatment. The gist of its argument is that what Mortgage Company really received 'was consideration for the transfer of the contingent right to earn future compensation,' so that the total payment called for in the sales contract to Cobbs-Allen has the taxable character of the income for which it is a substitute.' We think that the transaction before us represents clearly a sale of a capital asset and that the Commissioner and the Tax Court erroneously held otherwise."

(l.c. 901:)

"It cannot be doubted that the sum total of the ingredients of this long-standing relationship with such a satisfied clientele constitutes a property right which is the equivalent of good will—the probability that the old customers will resort to the old place. Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384, 22 L.R.A., N.S., 907 (1909). And it is equally plain that such a property right is a capital asset. Michaels, 12 T.C. 17, 19 (1949) acq. 1949-1 Cum. Bull. 3; Aitken et al., 35 T.C. 227 (1960); and Cox (1952), 17 T.C. 1287. And, without dispute, the capital asset here involved had been held more than six months, the economic value having been building up over an eight year period and the contract then in force between Taxpayer and

New York Life having been entered into May 5, 1953, prior to the sale on January 29, 1955."

(l.c. 903:)

"Here the taxpayer parted absolutely with title to rights it had accumulated over a number of years by contract and by a course of dealing, together with all of the books and records pertaining to those rights and dealings. It kept nothing but transferred to the purchaser all of its rights, title and interest in all of the valuable property rights arising from its relationship and dealings with New York Life. The facts before us differentiate this situation from those dealt with in the authorities cited by the Commissioner and the arguments advanced by him."

There is clear conflict between that decision and the decision here.

4. The Court of Appeals Erred in Holding There Was Here No Legitimate Business Purpose or Reasonable Expectation of Gain Apart from the Tax Savings and So Created Conflict with Other Courts of Appeals.

In the case of *Gregory* v. *Helvering*, 293 U.S. 465, 55 S. Ct. 266, this Court said (l.c. 267):

"The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. United States v. Isham, 17 Wall. 496, 506, L. Ed. 728; Superior Oil Co. v. Mississippi, 280 U.S. 390, 395, 396, 50 S. Ct. 169, 74 L.Ed. 504; Jones v. Helvering, 63 App. D. C. 204, 71 F.2d 214, 217."

In the case of *Shippy* v. *United States*, 8 Cir., 308 F.2d 743, the Court said (l.c. 747):

"[2] With the contention that tax motive is unimportant if taxpayer does that which the law permits, we agree."

In ruling here that there was not a business purpose and a bona fide sale and debt for part of the purchase price the Court brought its opinion into conflict with the opinion of the Second Circuit in the case of *Nassau Lens Co.* v. *Comsioner of Internal Revenue,* 2 Cir., 308 F.2d 39, where the Court said (l.c. 45):

> "Having found a lack of a business purpose *and* a disparity between the objective result and the ascertainable legislative purpose, the Court could proceed to tax the transaction with assurance. Similarly, in a more recent case, Knetsch v. United States, 364 U.S. 361, 81 S. Ct. 132, 5 L. Ed. 2d 128, the Court found that a transaction did not result in 'indebtedness' within the meaning of the tax laws. But that transaction was one which, when viewed apart from the desired tax consequences, could not result in a gain to the taxpayer. And, again, even though the tax motive was undoubtedly present, and a critical factor, the Court could certainly find that Congress, when drafting the particular sections, was concerned only with transactions entered into with some hope of profit apart from tax savings and not with transparent schemes objectively demontsrated to be ridiculous business propositions. In short, while the existence of a tax motive or the lack of a business purpose is the starting point for a challenge to the form of a transaction adopted by a taxpayer, it is in the absence of legislative intent to the contrary, not the finish line, for if the substantive result is of the general type considered by Congress to be within the particular provisions involved, the fact that a different but equally feasible form would have resulted in a greater tax is of no consequence. And since legislative intent must oftentimes be unclear, the form adopted will usually be recognized except where it is a patent distortion of normal business practice, as it was in Gregory and Knetsch."

In the case of *Commissioner of Internal Revenue* v. *Killian*, 5 Cir., 314 F.2d 852, the Court said (l.c. 855):

"The reality of the transaction here was that Killian sold to Ryan and Fry information concerning fire and casualty policies written by him over a period of many years. This information did indeed have intrinsic economic value in the nature of good will, which being made accessible to the purchasers gave reasonable expectation that 'the old customers will resort to the old place,' as it was put in Nelson Weaver Realty Co. v. Commissioner of Internal Revenue, 307 F.2d 897 (C.A. 5, decided September 12, 1962).

* * *

[3] It is settled that good will, as a distinct property right, is a capital asset under the tax laws. See Ensley Bank & Trust Co. v. United States, 154 F.2d 968 (C.A. 5, 1946), cert. den. 329 U.S. 732, 67 S. Ct. 94, 91 L. Ed. 633; V. L. Phillips & Co., Inc. et al. v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 199 F.2d 244 (C.A. 4, 1952); George J. Aitken et al. v. Commissioner of Internal Revenue, 35 T.C. 227 (1960)."

In the case of *Gilbert* v. *Commissioner of Internal Revenue*, 2 Cir., 248 F.2d 399, the Court said (l.c. 404):

"[6] Before discussing what we understand the Congress to have meant by 'debt' or 'indebtedness', we think it helpful to point out that the taxpayer's motive is not the crucial factor. This is but a corollary of the undoubted proposition, 'The incidence of taxation depends upon the substance of a transaction.' Commissioner of Internal Revenue v. Court Holding Co., 324 U.S. 331, 334, 65 S. Ct. 707, 708, 89 L. Ed. 981."

(l.c. 405:)

"As we said in Johnson v. Commissioner, supra, 86 F.2d at page 712:

> * * * it is too well settled to require discussion that legal transactions cannot be upset merely because the parties have entered into them for the purpose of minimizing or avoiding taxes which might otherwise accrue. Gregory v. Helvering, 293 U.S. 465, 469, 55 S. Ct. 266, 267, 79 L. Ed. 596, 97 A.L.R. 1355; Chisholm v. Commissioner, 2 Cir., 79 F.2d 14, 15, 101 A.L.R. 200; Sawtell v. Commissioner, 1 Cir., 82 F.2d 221, 222; Commissioner v. Yeiser, 6 Cir., 75 F.2d 956, 958. Despite such purpose, the question is always whether the transaction under scrutiny is in reality what it appears to be in form.' "

We submit the transaction here under scrutiny is in reality what it appears to be in form—the sale of the capital assets of a going business.

In the case of *Davis* v. *United States*, 10 Cir., 282 F.2d 623, the Court stated the rule tersely as follows (l.c. 627):

> "[2] It should be kept in mind that tax motive is unimportant if the taxpayer does that which the law permits. A taxpayer has a legal right to decrease the amount of what otherwise would be his taxes by means which the law permits."

We submit that as a matter of law appellants did only what under the law they had the right to do.

5. There Being No Allocation of the Purchase Price by the Parties the Whole Should Be Treated As a Capital Asset for Income Tax Purposes.

In refusing to recognize good will as a capital asset by refusing petitioners' requested charge No. 7 (Appendix p. A47) the Court of Appeals brought its opinion into conflict with the opinion of the Fifth Circuit in the case of *Commissioner of Internal Revenue* v. *Killian*, 5 Cir., 314 F.2d 852, where the Court said (l.c. 855):

"It is settled that good will, as a distinct property right, is a capital asset under the property laws. (Citing cases)."

See to like effect *V. L. Phillips & Co. Inc., et al.*, 4 Cir., 199 F.2d 244, 246 (1).

The fact that good will is not segregated and specifically mentioned in the contracts is not material. In the case of *Masquelette's Estate*, 5 Cir., 239 F.2d 322, the Court said (l.c. 325):

"[1, 2] The Tax Court here laid stress on the fact that the words 'good will' were not included in the sale of intangible assets. The use of these words is, of course, not necessary if in fact what is tranferred does give to the purchaser everything that can effectively aid him to step into the shoes of the seller. See Cox v. C. I. R., 17 T.C. 1287."

(l.c. 326:)

"[3] Finally, it seems to be conceded by the Government, as indeed it must, under the authorities, that if the agreement not to compete is a non-severable part of the conveyance of good will, then the entire purchase price is to be treated as having been paid for good will, then the entire purchase price is to be treated as having been paid for good will. This is precisely what the Tax Court held in Toledo Newspaper Co. v. C. I. R. supra, and it is the effect of the subsequent holding of the Tax Court in Toledo Blade Co. v. C. I. R., supra."

The ruling of the Court of Appeals affirming the judgment of the District Court ruling that all installment payments should be taxed as ordinary income in spite of the fact the parties in their negotiations and contracts never at any time attempted to comminute the assets or make any allocation of the assets of this going business brought this opinion into direct conflict with the opinion and judgment

of the Ninth Circuit in the case of *Annabelle Candy Company* v. *Commissioner of Internal Revenue*, 9 Cir., 314 F.2d 1.

In submitting the entire sale price and permitting the jury to find the entire sale price was ordinary income and taxable as such the Court submitted the case on an incorrect principle of law and brought its opinion into conflict with the opinion of the Fifth Circuit in the case of *General Guarantee Mortgage Co.* v. *Tomlinson, Dist. Dir.*, 5 Cir., 335 F.2d 518.

CONCLUSION

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit to the end that this cause may be reversed.

Walter A. Raymond

WALTER A. RAYMOND, and
KENNETH C. WEST
Counsel for Petitioners

CERTIFICATE OF COUNSEL

The undersigned, Walter A. Raymond, counsel of record for petitioners, hereby certifies that the above and foregoing petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit is submitted in good faith and is believed to be meritorious.

Walter A. Raymond

WALTER A. RAYMOND

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER 1967 TERM

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Appellants,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

No. 9153

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Claude L. Rice and Emmet A. Blaes (Thad E. Nugent and James L. Baska with them on brief) for Appellants.

Willy Norwind, Jr. (Mitchell Rogovin, Lee A. Jackson and Gilbert E. Andrews with him on brief) for Appellee.

Before MURRAH, Chief Judge, JONES* and HILL, Circuit Judges.

MURRAH, Chief Judge.

This action to recover "erroneously" refunded federal income taxes was instituted by the United States under §7405(b) of the Internal Revenue Code of 1954 against

*Sitting by special designation from the Fifth Circuit.

Ruth J. Rubel Jones and her husband John, appellants. The sole issue submitted to the jury was whether the income on which the subject taxes were paid was ordinary income or capital gains. This appeal is from a judgment on a jury verdict in favor of the United States. We affirm.

These basic facts were stipulated. Ruth and John Jones filed joint income tax returns in 1956 and 1957, reporting as ordinary income sums totaling $86,101.09 received by Ruth from Continental Casualty Company pursuant to an instrument which we will refer to as the "five percent agreement". In that document Ruth agreed for a period of ten years "to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group Insurance as shall be requested by Continental", and Continental agreed to pay Ruth "for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc." In 1960 Ruth and John filed a claim for refund, asserting that the sums reported as ordinary income were actually installment sale proceeds from the sale of Ruth's insurance business to one Forrest T. Jones and thus taxable as long-term capital gains. The Internal Revenue allowed in part the claim for refund on that theory, and remitted $15,992.45 to the taxpayers. Subsequently, however, the Government changed its mind and determined that the sums received by Ruth were properly taxable as ordinary income. This suit was then instituted to recover the amount of the refund.

These further relevant facts were either agreed upon or undisputed. Prior to 1953, Ruth was the owner of the Ruth J. Rubel Agency, a sole proprietorship specializing in accident and health insurance coverage for teachers' groups in the states of Kansas and Missouri. Continental

Casualty Company was the underwriter of the group insurance, and paid Ruth 22½% of the premiums as commission on group policies written by her. In August, 1953, the State of Missouri granted a certificate of incorporation to the Ruth J. Rubel Agency, Inc., and pursuant to an agreement dated August 19, Ruth transferred to the new corporation all the assets of the Ruth J. Rubel Agency, including the agency and commission contracts with Continental, in exchange for 100% of the corporation's capital stock. The assets received from Ruth were recorded on the books of the new corporation as having a value of $25,000.

Prior to incorporation of the agency, Ruth had commenced negotiations with one Forrest T. Jones[1] for the sale of her insurance business. Continental apparently played an important role in these negotiations.[2] By an Agreement of Sale bearing date of August 29, 1953, Ruth agreed to sell and Forrest agreed to buy all of Ruth's stock in the Ruth J. Rubel Agency, Inc. The instrument expressly provided that "The aggregate purchase to be paid by the Buyer to the Seller for the stock * * * shall be the sum of Twenty-Five Thousand Dollars ($25,000), to be paid in cash at the time hereinafter specified." About three years later, the instrument was amended by a document in which Ruth and Forrest agreed that the $25,000 purchase price recited in the Agreement of Sale was incorrect, and that the purchase price actually agreed upon by the parties was $50,000.

Contemporaneously with the Agreement of Sale, the parties entered into the so-called "five percent agreement", and also a "guaranty" agreement whereby Forrest guar-

1. Forrest Jones is not related to either Ruth or John Jones.

2. Continental loaned Forrest the sum of $55,000. $5,000 was retained by Forrest and $50,000 was paid to Ruth.

anteed to Ruth that the payments received by her under the five percent agreement would not be less than $15,000 per year, and that in the event the payments did not equal that amount, Ruth would have an option to purchase all of the capital stock of the Ruth J. Rubel Agency, Inc., for the sum of $1.00.

On trial of the case Ruth argued that the susbstance of the transaction was the sale of her insurance agency to Forrest; that the $50,000 to be paid under the amended Agreement of Sale was merely a down payment; and that the five percent payments, guaranteed to be at least $15,000 per year, were installment payments on the total purchase price. The Government, on the other hand, argued that Ruth was merely selling her stock in the Ruth J. Rubel Agency, Inc., pursuant to the Agreement of Sale for a total purchase price of $50,000 and that the five percent agreement and the guaranty document constituted a separate agreement between Continental and Ruth for consulting services. The $50,000 payment under the Agreement of Sale is concededly capital gains and is not in suit. The factual issue submitted to the jury was whether the amounts received in 1956 and 1957 by Ruth from Continental (i.e. $86,101.09) were part of the sale price of Ruth's insurance agency, hence capital gains, or compensation for services rendered, hence ordinary income. This clear-cut issue was succinctly presented to the jury in instructions which told them that "in determining whether the transaction between Mrs. Ruth Rubel Jones as seller and Forrest Jones as buyer was a single transaction implemented by the separate agreements * * *, or whether the agreement for the sale of stock to Forrest Jones * * * and the agreement by which Mrs. Jones received five percent of the premium income of the insurance agency * * * were separate undertakings, entered into for separate purposes, you will consider not only the written instruments them-

selves, but also all other facts and circumstances in evidence in the case which will aid you in arriving at the truth." The jury returned a verdict for the Government, finding that the amounts received by Ruth were "ordinary income received for service which she rendered or agreed to render."

Despite laborious argument of the facts in the taxpayers' brief, they do not specifically question the sufficiency of the evidence on appeal. Indeed, we think the evidence amply supports the verdict of the jury. The only arguable points here are the rulings of the trial judge excluding certain proffered exhibits and testimony, and his refusal to give an instruction on "good will".

Taxpayers offered in evidence five exhibits representing an exchange of correspondence between one Osborne (Continental's assistant Comptroller) and the office managers of Continental's branch offices in Kansas City and St. Louis, concerning problems that had arisen over the processing of Ruth's five percent payments. In substance, the correspondence directed the branches that in accordance with previous agreements between the parties,[3] the 22½% commissions to which the Ruth J. Rubel Agency, Inc., was entitled would be reduced by 5% and that this amount would be retained on the company ledgers until a future date when it would be remitted directly to Ruth Jones. The taxpayers argue that the exclusion of the exhibits as having no probative value is reversible error

3. In a written document dated August 20, 1953, Continental consented to the transfer by Ruth of the agency and commission contracts to the Ruth J. Rubel Agency, Inc., on the condition that if Ruth should dispose of her stock in the new corporation, then all commissions would be reduced by 5%. In an instrument dated August 31, 1953, the Ruth J. Rubel Agency, Inc., and Continental agreed that since Ruth had sold all her stock in the Ruth J. Rubel Agency, Inc. to Forrest Jones, all commissions due the agency would be reduced by 5%.

because the correspondence would have tended to prove that the five percent payments were being paid by Forrest as part of the purchase price of the agency, not by Continental as compensation for services rendered, and that Continental was merely the conduit by which the deferred payments were transmitted.

It is fair to say that the reasons for the introduction of these exhibits are far more clear in the taxpayers' brief than when offered to the trial judge. It may well be that in retrospect the letters were relevant to the nature of the transaction between Forrest and Ruth, but we must consider their relevancy here in the same context in which they were offered to and considered by the trial judge. The record shows that when each of these exhibits was offered into evidence and objected to as having no probative value, counsel for the taxpayers responded that they were inter-office correspondence "with respect to problems that arise with the branch offices and Continental Casualty Company on the five percent." No other explanation or claim was made for the exhibits. It was certainly incumbent upon counsel to fully apprise the trial judge of the purposes for which the exhibits were offered and their probative value for such purposes. His explanation did not do so. In these circumstances we certainly cannot say that the trial judge's exclusion of the exhibits was erroneous.

Taxpayers next complain of the trial court's exclusion of the deposition testimony of Paul Fisher, head of Continental's group insurance division, pertaining to his knowledge about all consultants employed by Continental.[4]

4. The following testimony of Fisher was excluded as irrelevant: "Q. Could you state the name of all the consultants to your knowledge that were employed by Continental Casualty Company at any time? A. Mr. Milt Monash. Q. And will you state also their addresses or where they can be located? A. He lives in Atherton, California. And Mr. Densdale Walker, he lives in California, in Los Angeles, and I think Mr. Bruckner Chase

The argument appears to be that Fisher's testimony was relevant to show that Ruth was not actually employed by Continental as a consultant, and thus the five percent payments were received by her as part of the purchase price. Again, in retrospect, this testimony may have some relevancy. But it was remote, and, moreover, cumulative of other evidence; it added nothing new to the taxpayers' case. See Titanium Actynite Industries v. McLennan, 272 F.2d 667; Branding Iron Club v. Riggs, 207 F.2d 720. The exclusion of this evidence does not appear to be inconsistent with substantial justice in the case. See Rule 61, F.R.C.P.; Jones v. Auto. Indem. Ass'n of Bloomington, Ill., 287 F.2d 27.

To establish the value of the insurance agency at the time of its sale to Forrest, Ruth called as an expert witness one David Kosh. His testimony was offered to show that the value of the agency was greatly in excess of $50,000. As to his qualifications, Kosh testified that his specialty field is "the economy, the finances, the regulation, evaluation and all the elements that go * * * [into the] pricing of utility services", but he admitted that he had "never made an evaluation of an insurance company." The trial judge refused to permit the witness to testify as an expert on the evaluation of this insurance agency. Suffice it to say that we find no abuse of the wide discretion accorded the trial court in determining the qualifications of a witness to testify as an expert in matters of this nature. See Whitehead v. Salyer, 346 F.2d 207; Barnes v. Smith, 305 F.2d 226.

Finally, the taxpayers complain of the trial judge's failure to include in his charge to the jury a requested

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was employed as a—more of a promotional consultant. When you get into that area there is a lot of others like advertising agencies and people like that. * * * Q. Other than advertising agencies, are these all the people that you know of that were employed as consultants? A. That's all I know about that I recall."

abstract instruction on "good will". It is argued that such an instruction was essential to the taxpayers' theory of the case that the insurance agency had a "value" far in excess of the $50,000 amount recited in the Agreement of Sale, as amended.

During trial, counsel for the taxpayers indicated that proof would be offered to establish the value of the agency at the time of the sale as tending to show that the five percent payments were part of the purchase price. Over Government's objections, the trial judge tentatively ruled that "testimony of value, if it be competent testimony of the value, would have some bearing on that issue and would be properly admissible." Pursuant to this ruling, both taxpayers testified to the effect that at the beginning of the negotiations with Forrest, Ruth made it clear that her asking price for the agency was three to four hundred thousand dollars. David Kosh was then called to give his opinion as to the value of the agency in 1953, but, as we have seen, the trial judge properly ruled that Kosh was not qualified to testify as an expert concerning the value of the agency. No other evidence of the agency's value was offered by the taxpayers.

At the conclusion of the court's instructions, counsel for taxpayers objected "to the omission of [his] requested instruction * * * No. 7 [the] instruction on good will." This form of objection raises serious doubts as to whether the trial judge was fully apprised of the nature of the objection as contemplated by Rule 51, F.R.C.P. But, conceding arguendo the propriety of the objection, we think the testimony regarding the asking price of the insurance agency, standing alone, formed a thin and tenuous basis for the abstract instruction on good will. Certainly, we cannot say in these circumstances that Judge Stanley erroneously refused to give the tendered instruction.

The judgment is affirmed.

APPENDIX B

Judgment Court of Appeals

FIFTEENTH DAY, NOVEMBER TERM, MONDAY, DECEMBER 4th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, Honorable Warren L. Jones and Honorable Delmas C. Hill, Circuit Judges.

John Paul Jones and Ruth J. Rubel Jones,
Appellants,
vs.
United States of America,
Appellee.

9153

Appeal from the United States District Court for the District of Kansas.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

Verdict and Judgment in District Court

We, the Jury, find that the amounts received by Mrs. Ruth Rubel Jones from Continental Casualty Company (that is, $36,909.08 for 1956 and $49,172.21 for 1957) were ordinary income received for service which she rendered or agreed to render and we return our verdict for the Plaintiff, United States of America.

Charley Hall
(Foreman)

Feb. 18, 1966
(Date)

Filed February 18, 1966.

Judgment

This action came on for trial before the Court and a jury, Honorable Arthur J. Stanley, Jr., District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

Jones et al. vs. U.S.A.

It Is Ordered And Adjudged that the plaintiff, the United States of America, shall have judgment against the defendants, John Paul Jones and Ruth J. Rubel Jones, and judgment is hereby entered in favor of the plaintiff, the United States of America, and against the defendants, John Paul Jones and Ruth J. Rubel Jones, for the sum of $15,992.45 for the amount erroneously refunded to the defendants, and for the sum of $4,488.40 for interest to the date of this judgment, together with interest at the rate of 6% per annum from the date hereof on the total sum of $20,480.85, for all of which sums let execution issue; and for the costs of the plaintiff in this action as provided by law.

Done and Ordered at Kansas City, Kansas, this 1st day of April, 1966.

Arthur J. Stanley, Jr.
United States District Judge

Approved: Thomas E. Joyce, Asst. U.S. Atty.; Rice Groner Nugent & Baska, by James L. Baska, Attys. for Defendants.

Filed April 1, 1966.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9153

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

Appellants' Petition for Rehearing

Over a period of years, Ruth Jones developed a business specializing in group insurance. This business was so unique that, at the time of the sale of the business in 1953, there were no known prior sales of comparable businesses. (R-975) All of her group insurance prior to sale was written through Continental Casualty Company. In 1953, she commenced negotiations with Forest Jones, a past officer of Continental Casualty Company, which resulted in the sale of the business to Forest Jones in August, 1953.

She received funds as a result of two agreements. Due to a purported stock purchase contract with Forest Jones, she received $50,000.00. Due to a purported consultation contract with Continental Casualty Company, she received, over a ten year period, $687,479.12, an average per year

of $68,747.91, which was reported on a joint return with her husband John. The issue presented by the trial court to the jury was whether this $687,479.12 was ordinary income or capital gains. (O-2) More specifically, the issue was whether the $687,479.12 was paid by Continental Casualty Company for the consultation labors of Ruth Jones, or paid by Forest as a part of the purchase price of the agency.

The written contracts (the purchase contract and the consultation contract) are the instruments in issue. Specifically, Appellants had to show that the consultation contract (the 5% consultation agreement) was not what it purported to be, but was in fact a sham. It, in reality, represented part of the purchase price and the amounts purportedly received therefrom were actually paid by Forest Jones, not Continental.

Appellants were denied the right to present this issue to a jury. They were denied a fair trial. The jury rendered its decision in favor of the Appellee, a conclusion which it had to reach due to the trial court's refusal to permit converse facts into evidence. This court affirmed the decision of the trial court, and as a result, this petition for rehearing became necessary.

The trial court erred in not permitting the Appellants:

1. To introduce evidence showing that the funds paid Ruth Jones purportedly for consultation services were in fact paid by the purchaser, Forest Jones, and not Continental Casualty Company, which purportedly received the consultation service;

2. To introduce evidence showing that the value of the business at the time of sale was not $50,000.00 (the purported purchase price) but was in fact $450,000.00;

3. To instruct the jury that goodwill was a factor to be considered. Without a goodwill instruction, the jury had no choice but to find that the funds in excess of $50,000.00 were paid for services. There was no other possible conclusion.

This court erred in affirming the rulings of the trial court that Appellants' Exhibits L, M, N, O and P were inadmissible. These exhibits went to the heart of Appellants' case. In order for Appellants to prevail, they needed to establish that the consultation contract (the 5% agreement) was a sham. That is exactly what these exhibits showed, yet they were ruled inadmissible. They showed that the funds paid Ruth Jones came not from Continental Casualty Company, the purported user of Ruth Jones' consultation services, but from Forest Jones, the purchaser of the business. This was one of the most significant facts of Appellants' case. This Court, in its opinion, implied that the annual payments flowing from the purported consultation contract were guaranteed by Continental Casualty Company. (O-5) This is untrue. The guarantee of minimum future payments was not made by Continental. It was Forest Jones, the purchaser, who guaranteed the payment of at least $15,000.00 per year. (Exhibit F) If Forest Jones did not perform, he would lose the agency to Ruth for $1.00. This loss would include the loss of his entire $50,000.00. (Exhibit F) It is difficult to conceive that Forest Jones would risk the "entire purchase price." It is conceivable that he would risk a down payment.

Appellants were denied the right to submit to the jury these significant exhibits which had a direct bearing on the primary issue. They were denied the right to introduce exhibits showing who actually paid the funds. This Court, in its original opinion, recognized that these exhibits were relevant but justified their exclusion on the grounds

that the trial court may not have been adequately apprised of the purpose for which they were offered. (O-8) In view of the theory of defendant's case as presented to the trial court at the commencement of the trial, the content of these exhibits themselves, which had been discussed and marked at the pretrial hearing and which the court examined at the time offered, supplemented by the explanation of counsel at the instant of the offer, made the trial court fully cognizant of the purpose for which these exhibits were offered. Therefore, the refusal to admit was error on the part of the trial court and this court erred in affirming the trial court. If the jury had had these excluded exhibits before them, it is very possible that they would have reached the conclusion that the funds from the 5% consultation contract were in fact paid by the purchaser and not Continental Casualty Company. This is most significant and it is error to brush such evidence aside as not being probative; which was the only objection made to it. What fact could be more relative than "who paid the money"? The Appellee argues that these funds were paid for consultation services, yet they were paid by the purchaser, not the corporation which purportedly received the services. It was error not to receive these exhibits into evidence.

If it was significant to Appellants' case to have evidence as to who paid the funds, then it was error on the part of the trial court to exclude the exhibits containing such evidence. In *United States* v. *Kauffmann*, 84 F. Supp. 550 (E.D. Mo. 1949), a new trial was granted where the court excluded exhibits showing facts converse to the agreement in issue. In *Boston Ins. Co.* v. *Jensen*, C.A. 9th 1958, 259 F. 2d 482, a new trial was granted where the trial court excluded exhibits tending to show a motive. Rejection of material competent evidence is grounds for a new trial. (*Spena* v. *Goffe*, 112 K. 693, 212 P. 1093.) The Ap-

pellants were trying to show who paid the funds which were the basis of the entire lawsuit. It was prejudicial error to exclude these exhibits dealing with this basic point.

This Court further erred in affirming the ruling of the trial court, refusing to permit David Kosh to testify as an expert on the valuation of this insurance business. (O-9)

The testimony of David Kosh as to the value of Ruth Jones' agency at the time of sale was extremely significant to Appellants' case. There was testimony that funds flowed to Ruth Jones from two sources. From the sale of stock, $50,000.00 came to her. From an agreement, which purported to be a consultation contract (the 5% agreement), $687,479.12 came to Ruth Jones. Appellants' chore in this case was to show that the $687,479.12 was received not for consultation services, but as part of the purchase price of the agency. In order to demonstrate that such a purchase price was within the realm of reason, Appellants offered the testimony of David Kosh as an expert. Without his testimony, the jury had no evidence which would justify a sales price in excess of $50,000.00.

Even more significant, the jury had no evidence before it which would demonstrate how unrealistic and nominal the purported $50,000.00 sales price actually was.

Appellants were prohibited from showing by expert testimony just what Ruth Jones' business was worth. The jury was permitted no standard by which to compare.

The Appellee was permitted to use the testimony of Lawrence J. Ackerman as an expert, yet Appellants were denied the testimony of David Kosh as an expert, even though the qualifications of the two were quite comparable.

1. Neither had ever evaluated this type of business before. (R. 973, 1892)

2. Neither had knowledge of sales of comparable businesses. (R. 975, 1892)

3. (a) Ackerman had a Masters Degree from Wharton School of Finance and Commerce. (R. 925)

(b) Kosh had a Masters Degree from New York University in Business Administration with majors in economics and finance. (R. 1880)

(c) Ackerman had begun work on a Doctors Degree, but abandoned it. (R. 925)

4. (a) Ackerman had specialized in evaluating *property* insurance businesses, but had never evaluated a business where group insurance was a dominant factor. (R. 928, 973)

(b) Kosh had specialized in evaluating going business concerns, but had never evaluated a business where group insurance was a dominant factor. (R. 1880, 1982)

5. Both men had read in reference to insurance evaluation. (R. 926, 1889)

6. (a) Ackerman had been Dean of an Insurance College as his life's work. (R. 922)

(b) Kosh had been in the general business of economic and financial consulting and evaluating as his life's work. (R. 1880, 1885)

The trial court permitted Ackerman to testify as an expert for the government, but refused to permit Kosh, a professional business appraiser to testify as an expert. This was error.

In connection with his evaluation, Kosh prepared an 18 page report with an additional 18 pages of exhibits. This report displays the great amount of knowledge and work that went into Kosh's evaluation. It is being sub-

mitted herewith as an appendix to this petition. Kosh's report was received by the trial court as an offer of proof with the understanding that it would not go to the jury. (R. 1896) Even Ackerman, the Appellee's expert, acknowledged the depth of the report when he stated, "I had a chance to read it over. I feel I could study it for another two or three more weeks . . . this technique, by the way, has been discussed at times by people interested in the subject, but I have never known of it actually being used in my experience. I think I'd want to study this more carefully. *I'm always interested in new ideas and maybe this man has a gem of a new idea.*" (R. 942-943)

David Kosh testified that he was a professional business evaluator and consultant; that he had his Masters Degree in business with majors in economics and finance; that he had read in the area of insurance evaluation, and that he had prepared this extensive report which was received as an offer of proof and speaks for itself. To hold that a proper foundation had not been laid for his testimony as an expert is error. This is especially true, in view of the necessity and significance of his testimony to Appellants' case and the fact that Ackerman was permitted to testify. By affirming the trial court, this court apparently has overlooked the fact that there were no comparable sales and, therefore, as a matter of law, even general testimony as to value is very much admissible.

A proper foundation was laid for Kosh's testimony as an expert, and it was error to rule to the contrary, and it is error on the part of this court to confirm that ruling.

Rule 43 of the Federal Rules of Civil Procedure provides that, "All evidence shall be admitted which is admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States

Court is held. In any case, the statute or rule *which favors the reception of evidence governs . . .*" (Emphasis Supplied.) In reference to expert testimony, Kansas Statutes Annotated, 60-456(b) provides, "If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing; and (2) within the scope of the special knowledge, skill, experience *or* training possessed by the witness." (Emphasis Supplied.) In *Stertz* v. *Briscoe*, 184 K. 163, 334 P. 2d 357, a consulting chemist was qualified to testify as to the effect of a certain poison on human beings. In *Cline* v. *Kansas Gas & Electric Co.*, 182 K. 155, 318 P. 2d 1000, an electrical engineer with radio experience was qualified to testify as to interference with television by electric lines.

David Kosh's life work was devoted to evaluating going businesses. It is inconceivable that he did not qualify as an expert, under the law, to evaluate a going business. He meets all of the qualifications of KSA 60-456(b) to testify as an expert. There were no comparable sales, general evaluation testimony is admissible. The trial court grossly abused its discretion by excluding his testimony. The discretion of the trial court does not assume the power to prohibit a person as qualified as Kosh from testifying. It is error to affirm such a clearly erroneous ruling. Evidence should be liberally admitted, not arbitrarily excluded.

The trial court further erred in refusing to give Appellants' tendered instructions concerning goodwill, and this court erred in affirming the trial court. (O-11) By refusing to instruct on goodwill, the trial court refused to instruct on one of the basic issues of the entire trial. The

sole question was whether the $687,479.12 was received for services rendered or as part of the sales price. Goodwill is a factor in the composition of every sale of a business. This is extremely significant in a service business, where the ability to sell and retain clientele is initially based upon the reputation and acceptance of the seller of the business in the community. Ruth Jones' cost basis in the furniture and fixtures in this business was only $1,593.74. (Appellants' Brief 14) The remaining value lies in the ability of the purchaser to retain the goodwill generated by the seller, which results in the retention of clientele and the production of income.

Mr. J. Melburn Smith, the President of Continental Casualty Company, when testifying concerning the sale stated, "Well, the nature of this business is such that the person who creates it has control over it, so that if that person desires to place it with another company, it's not a difficult job for them to accomplish it . . . I was concerned what she would do to destroy the business rather than what she would do to preserve it." (R. 1835-1836) In other words, he was concerned with acquiring and retaining Ruth Jones' goodwill, not her services.

This goodwill, this ability to shift clientele was the major asset owned by Ruth Jones and sold by Ruth Jones. It is the heart of this case. The trial court erred in excluding expert testimony as to value and in excluding exhibits indicating who paid the funds. These significant errors tied Appellants' hands severely, hampering their ability to develop testimony as to goodwill in the case. With no valuation testimony, with no exhibits showing who paid the funds, and with no instructions on goodwill, what possible conclusion could the jury reach other than that the funds were paid for services rendered.

The trial court, by a gross abuse of discretion, erroneously excluded basic testimony relating to goodwill. The trial court then refused to instruct as to goodwill and this court erroneously affirmed the trial court, stating, ". . . we think the testimony regarding the asking price of the insurance agency, standing alone, formed a thin and tenuous basis for the abstract instruction on goodwill." (O-11) This court's statement is true, yet it is 100% without foundation. An asking price is a thin and tenuous basis, but an asking price is not the basis upon which the trial judge should have instructed as to goodwill. The trial court had before it in this tax case the following facts:

1. Ruth Jones' basis in the assets sold was $1,593.74. (Appellee's Brief 14)
2. During the eight months preceding the sale, these assets made a net profit of $33,254.15. (Exhibit K-1)
3. Ruth Jones sold these assets
4. Ruth Jones received $737,479.12. (R. 10, 15)
5. Ruth Jones rendered no consultation services to Continental Casualty Company. (R. 2093)

This evidence can be interpreted to mean that the funds which Ruth Jones received were part of the purchase price. The court refused to instruct on goodwill as being an aspect of the purchase price and this court affirmed that error. Facts supporting this basic instruction were in issue. "The function of instructions is to advise the jury with respect to the law governing all issues joined by the pleadings upon which evidence is adduced. If the instructions were materially erroneous or inadequate, a new trial should be granted." *Lord* v. *Hercules Powder Co.*, 161 K. 268, 271, 167 P. 2d 299 (1946).

"The (Kansas) Code of Civil Procedure requires the court to give general instructions to the jury, with or with-

out request having been made for the same." (G.S. 1949, 60-2909, 5th). This provision has frequently been interpreted to require the court to define the issues and state at least generally the law applicable thereto." *Natanson* v. *Kline,* 186 Kan. 393, 398, 350 P. 2d 1093 (1960).

The rulings by the trial court, sustained by this court, refusing to admit into evidence exhibits showing who paid the funds in question severely prejudiced Appellants' case. The trial court committed reversible error by these rulings, because the exhibits in question would have brought to light facts which were extremely important. It was of maximum importance that the jury know that the funds Ruth Jones received were paid by the purchaser, Forest Jones, and not by Continental Casualty Company, which purportedly was to have received Ruth's consultation services. How could the jury be expected to find that these funds were part of the purchase price when the trial court would not even permit Appellants to show that the purchaser paid the funds, regardless of what the sham contract may have purported. These rulings were error and it was error to affirm them.

The ruling by the trial court refusing to permit David Kosh to testify as an expert witness severely prejudiced Appellants' case. In order for the jury to determine what a reasonable sales price would be, i.e., whether a reasonable sales price would include just the stock sales contract funds, or in addition the "5% consultation" funds, it was necessary that they be permitted to hear expert testimony as to the value of that which was being sold. David Kosh was qualified to testify. He had his Masters Degree in economics and finance, his life's work was evaluating businesses; he had read as to the peculiarities of insurance, and finally the extensive report submitted to the trial court displayed quite amply his qualifications. David Kosh was qualified,

and even general evaluation testimony was admissible. The trial court's ruling was error and it was error to affirm it.

By refusing to instruct on goodwill, the trial court ignored and refused to place before the jury one of the major issues of this lawsuit. This was error and it is error to affirm the trial court's ruling on this point. Certainly there could not be in evidence a great deal of facts dealing with goodwill, because the trial court refused to admit such facts into evidence. The lack of facts caused by the error of refusing to admit facts into evidence, should not be permitted to serve as a justifiable excuse for committing error in refusing to instruct. The appellants in actuality have never been permitted to submit their case to a jury.

". . . where so many errors are committed as to deprive the plaintiff of a fair trial, in the interest of justice a new trial should be ordered even though some of the errors were not called to the attention of the trial court." (*Carpenter v. Gillard*, 166 K. 689, Syl. #8, 204 P. 2d 595.)

Therefore, Appellants respectfully request that this Court reconsider its opinion which affirmed the rulings of the trial court, and rule that the trial court erred and that the Appellants are entitled to a new trial.

Respectfully submitted,

CLAUDE L. RICE
THAD E. NUGENT
JAMES L. BASKA
506 Huron Building
Kansas City, Kansas
and
EMMET A. BLAES
L. D. KLENDA
500 Farmers & Bankers Life Building
Wichita, Kansas

Appellants hereby certify that this Petition for Rehearing is not presented for the purpose of vexation or delay, but is, in the opinion of counsel, well founded in law and proper to be filed in the case.

CLAUDE L. RICE
THAD E. NUGENT
JAMES L. BASKA
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Kansas City, Kansas
and
EMMET A. BLAES
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500 Farmers & Bankers Life Building
Wichita, Kansas
Attorneys for Appellants

APPENDIX E

Order Overruling Motion for Rehearing

JANUARY TERM, FRIDAY, FEBRUARY 2nd, 1968.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Warren L. Jones and Honorable Delmas C. Hill, Circuit Judges.

John Paul Jones et al., Appellants, vs. United States of America, Appellee. 9153	Appeal from the United States District Court for the District of Kansas.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX F

Statutes

Title 26, U.S.C., § 7482. Courts of review

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

Title 28, U.S.C., § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 26, U.S.C., § 7401. Authorization

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. Aug. 16, 1954, c. 736, 68A Stat. 873.

Title 26, U.S.C., § 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments.—The district courts of the United States at the instance of the

United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

Title 26, U.S.C., § 7405. Civil Action by United States

(b) Refunds otherwise erroneous.—Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

Title 28, U.S.C., §1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. June 25, 1948, c. 646, 62 Stat. 932.

Title 28, U.S.C., § 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. June 25, 1948, c. 646, 62 Stat. 933.

APPENDIX G

DEFENDANT'S EXHIBIT A

Agreement and Bill of Sale

THIS AGREEMENT, made and entered into this 19th day of August, 1953, by and between RUTH J. RUBEL JONES, d/b/a RUTH J. RUBEL AGENCY, hereinafter referred to as the "Seller", and RUTH J. RUBEL AGENCY, INC., a Missouri corporation, hereinafter referred to as the "Buyer",

WITNESSETH:

WHEREAS, the Seller owns, controls and operates an insurance business as a sole proprietor under the firm name of Ruth J. Rubel Agency and desires to transfer all of said business, subject to all of its liabilities, and

WHEREAS, the Buyer desires to acquire said assets, subject to said liabilities, in exchange for all issued capital stock of the Buyer, and

WHEREAS, the parties have carried on negotiations looking toward the sale and exchange of said assets and have reached an understanding with respect thereto,

NOW THEREFORE, for valuable consideration, the existence, sufficiency and receipt of which is acknowledged by each party, the parties hereto do enter into the following covenants, agreements, warranties, actions and undertakings:

1. *Sale of Assets:* Seller hereby grants, bargains, sells, assigns, transfers, conveys and delivers unto the Buyer all of the properties and assets of every kind and character belonging to and used in the operation of the Ruth J. Rubel Agency, said properties and assets being particularly described in Schedule A attached hereto and by this reference incorporated herein.

2. *Consideration*: In consideration of the sale, transfer and exchange, the Buyer covenants and agrees to deliver to the Seller stock certificate or certificates representing the capital stock of the Seller as follows:

(a) Common stock certificate or certificates representing 10,000 shares common stock par value $1.00 each, and

(b) Preferred stock certificate or certificates representing 150 shares of preferred stock par value $100.00 each,

the foregoing being all the issued capital stock of the Seller. At the option of the Seller any portion of the foregoing shares of capital stock, either preferred or common, shall be issued in the name or names of such nominee or nominees as the Seller may request.

3. *Assumption of Liabilities by Buyer*: As an essential part of the consideration for the transfer of the properties and assets described in Schedule A attached hereto, the Buyer covenants and agrees to assume, pay and discharge all liabilities incurred in, or in connection with, the operation of the Ruth J. Rubel Agency commencing September 1, 1953.

4. *Reservation for Use of Assets*: As further consideration for the transfer of the assets particularly described in Schedule A attached hereto, the Buyer covenants and agrees to permit the Seller to use exclusivly the properties and assets transferred hereunder to and including August 31, 1953, including the right in the Seller to collect and retain all premiums on insurance contracts until said date.

5. *Buyer's Authority*: The covenants, agreements, warranties, actions and undertakings of the Buyer, which are herein evidenced, have been duly authorized by the Board of Directors of the Buyer.

6. *Construction*: This Agreement shall be construed under the laws of the State of Missouri.

7. *Obligations and Benefits*: This Agreement shall be binding upon, and shall inure to the benefit of the Seller, her heirs, executors, administrators and assigns and the Buyer, its successors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto executed this Agreement in duplicate the day and year first above written

/s/ Ruth J. Rubel Jones
d/b/a Ruth J. Rubel Agency
Seller
Ruth J. Rubel Agency, Inc.,
a Missouri corporation
By /s/ Dale W. Jones
Its Vice-President

Attest:
/s/ John Paul Jones
Secretary
(Corporate Seal)

SCHEDULE A

INVENTORY OF OFFICE FURNITURE & FIXTURES
RUTH J. RUBEL AGENCY

3 wood typewriter desks with glass tops
1 wood secy typewriter desk
4 posture chairs
1 wood executives desk and telephone stand
1 wood typewriter desk in storage room
1 small wood table
1 hall tree
1 straight wood chair
2 wood arm chairs

4 Remington 3/4 ton window room coolers
1 I B M Electromatic typewriter
1 Royal Typewriter, #KMM 12-2856781
1 Underwood typewriter, #11-6005121
1 Elliott Addressing machine
1 Elliott Address stencil cabinet
4 Wastepaper baskets
1 step ladder
2 large supply cabinets, metal
1 large supply cabinet, wood
1 large supply cabinet, metal, in Continental Branch at St. Louis
1 Allen-Wales electric adding machine
1 Todd check protectograph
1 Pitney-Bowes postal scales
1 Simplex gummed tape dispenser
1 Electric clock
1 Shaw Walker locked file cabinet, (wood), two letter size drawers
2 Shaw Walker file cabinets, (wood) 4 letter size drawers
1 Shaw Walker card file, metal, with metal base, 7 drawers
1 Globe-Wernicke locked file, metal, 4 letter size drawers
1 Bentson file cabinet, metal, 4 letter size drawers
1 Art Steel file cabinet, metal, with combination of 2 card file drawers and 3 letter size drawers.
12 Cole card files, metal, two drawers each
1 Metal master card file, double drawer
5 Ply wood card files, double drawers each miscellaneous cardboard files
16 wood correspondence boxes
2 desk pen sets
2 pencil sharpeners
2 staplers

INSURANCE CONTRACTS HELD BY RUTH J. RUBEL AGENCY WITH CONTINENTAL CASUALTY COMPANY:

1. a General Agent contract under the Commercial Division dated July 25, 1946 providing the following commission provisions:

Accident only policies	35%
Health only policies	30%
Combination A & H	33 1-3 %
Hospital policies	33 1-3 %

2. A General Agent Contract with; the Non-Cancellable Accident Division, Accident and Health Department, dated July 25, 1946, providing for payment of a 30% commission on premiums paid to the company for 10 years with respect to each policy issued there under; and for payment of a 15% collection fee after the 10th year on such policy premiums collected and paid to the Company.

3. A General Agent contract with the Disability Division whereby the Company agrees to pay a renewal commission of 32½% plus all of the 1st month premium, plus all of any policy fee.

4. Special commission contracts on Group Insurance written under the Association Group Division of the Accident and Health Department as listed below:

   A. Kansas City Missouri Teachers Group Policy No. 1-G-3719

   B. Kansas City Missouri Custodians and Repairmens' Group Accident Policy No. 1-G-1590

   C. Kansas City Missouri Custodians and Repairmens' Group Sickness Policy No. 2-G-1590

   D. Kansas City Kansas Teachers Group Policy No. 2-G-3719 & A

   E. Springfield Missouri Teachers Group Policy No. 1-G-5819 & A

F. Springfield Missouri Custodians Group Policy No. FG-6890

G. St. Louis Missouri Teachers Group Policy No. 5-G-6919

H. Missouri State Teachers Association Group Policy No. 1-G-5019

I. Northeast Johnson County, Kansas Teachers Group Policy No. 2-A-3619

DEFENDANT'S EXHIBIT B

Agreement to Assignment

THIS AGREEMENT, made and entered into as of the 20th day of August, 1953, by and between *RUTH J. RUBEL AGENCY, INC.*, a Missouri corporation, hereinafter referred to as "Agency" and *CONTINENTAL CASUALTY COMPANY*, an Illinois corporation, hereinafter referred to as "Company",

WITNESSETH:

WHEREAS, the Company and Ruth J. Rubel (now Ruth J. Rubel Jones) have heretofore entered into certain agency contracts and commission agreements, detailed in Paragraph (1) hereinafter, and

WHEREAS, Ruth J. Rubel Jones has transferred and assigned said contracts and agreements to the Agency, subject to the consent of the Company, and

WHEREAS, the Company has consented and agreed to said assignments on the conditions herein specified,

NOW THEREFORE, in consideration of the covenant of the Agency to perform said contracts and agreements, and other consideration, the sufficiency and receipt of which is acknowledged by each party, it is agreed as follows:

(1) The Company recognizes, consents and agrees to the assignment by Ruth J. Rubel (now Ruth J. Rubel Jones) to Ruth J. Rubel Agency, Inc., a Missouri corporation, of the following described agency contracts and commission agreements:

1. A General Agent contract under the Commercial Division dated July 25, 1946 providing the following commission provisions:

Accident only policies	35%
Health only policies	30%
Combination A & H"	33 1-3%
Hospital policies	33 1-3%

2. A General Agent contract with the Non-Cancellable Accident Division, Accident and Health Department, dated July 25, 1946, providing for payment of a 30% commission on premiums paid to the company for 10 years with respect to each policy issued thereunder, and for payment of a 15% collection fee after the 10th year on such policy premiums collected and paid to the Company.

3. A General Agent contract with the Disability Division whereby the Company agrees to pay a renewal commission of 32½% plus all of the 1st month premium, plus all of any policy fee.

4. Special commission contracts on Group Insurance written under the Association Group Division of the Accident and Health Department as listed below:

   A. Kansas City Missouri Teachers Group Policy No. 1-G-3719

   B. Kansas City Missouri Custodians and Repairmens' Group Accident Policy No. 1-G-1590

   C. Kansas City Missouri Custodians and Repairmens' Group Sickness Policy No. 2-G-1590

   D. Kansas City Kansas Teachers Group Policy No. 2-G-3719 & A

E. Springfield Missouri Teachers Group Policy No. 1-G-6819 & A

F. Springfield Missouri Custodians Group Policy No. 1-G-6890

G. St. Louis Missouri Teachers Group Policy No. 5-G-6919

H. Missouri State Teachers Association Group Policy No. 1-G-5019

I. Northeast Johnson County, Kansas Teachers Group Policy No. 2-A-3619

(2) The said Agency is hereby vested with all rights and assumes all duties of Ruth J. Rubel under said contracts and agreements.

(3) This agreement by the Company is on the express representation that Ruth J. Rubel Jones is the owner of at least 90% of the issued stock of the Agency. In the event that said Ruth J. Rubel Jones should dispose of her stock, or sufficient thereof to reduce her ownership to less than 90% of all issued stock, or in the event that Ruth J. Rubel Jones should cease to be in active charge and direction of the Agency so that the Company is not receiving, through the Agency, the benefits of her experience, contacts and abilities, then at the request of the Company the Agency will execute an amendment to each of said contracts and agreements reducing by five (5) percentage points all commissions payable under each such contract and agreement.

Ruth J. Rubel Agency, Inc.
By: /s/ Ruth J. Rubel Jones
President
Continental Casualty Company
By: /s/ Signature illegible
Title: Vice President

Approved:
/s/ Ruth J. Rubel Jones
individually

DEFENDANT'S EXHIBIT C

Agreement of Sale

THIS AGREEMENT, made and entered into this 29th day of August, 1953, by and between RUTH J. RUBEL JONES, 949 New York Life Building, Kansas City, Missouri, hereinafter called the "Seller" and FORREST T. JONES, of 515 West Maple Street, Hinsdale, Illinois, hereinafter called the "Buyer",

WITNESSETH

WHEREAS, the Seller is the legal and equitable owner of all the outstanding capital stock of RUTH J. RUBEL AGENCY, INC., a Missouri corporation, hereinafter called the "Corporation", all of which she desires to sell, and

WHEREAS, the Buyer desires to purchase all of the outstanding capital stock of the Corporation, and

WHEREAS, the parties have carried on negotiations leading toward this Agreement and deem it advisable to reduce the same to this writing,

NOW THEREFORE, the parties hereto do mutually agree as follows:

(1) *SALE OF STOCK*: The Seller agrees to sell, and the Buyer agrees to buy, all of the issued and outstanding capital stock of the Corporation, consisting of 10,000 shares of common stock of par value $1.00 per share, evidenced by Certificates Nos. 4, 5, & 6 and 150 shares of 6% preferred non-voting stock of par value $100.00 per share, evidenced by Certificate No. 1.

(2) *PURCHASE PRICE AND METHOD OF PAYMENT*: The aggregate purchase to be paid by the Buyer to the Seller for the stock, particularly described in Para-

graph 1 of this Agreement, shall be the sum of Twenty-Five Thousand Dollars ($25,000.00), to be paid in cash at the time hereinafter specified.

(3) *CLOSING OF SALE:* The closing of the sale shall take place at 949 New York Life Building, Kansas City, Missouri, on or before the 1st day of September, 1953. At the closing the Seller shall deliver to the Buyer, free and clear of all encumbrances, certificates for the shares sold hereunder, in negotiable form, with all requisite stock transfer stamps attached. Upon such delivery, the Buyer shall deliver to the Seller a certified or bank cashier's check payable to the order of such Seller in the amount of the aggregate purchase price specified in Paragraph 2 of this Agreement.

(4) *REPRESENTATIONS, WARRANTIES AND COVENANTS OF SELLER:* The Seller represents, warrants and covenants as follows:

(a) *Organization and Standing of Corporation:* That the Corporation is and will be at the date of closing a corporation duly organized, validly existing and in good standing under the laws of the State of Missouri; that the copy of the Corporation's Articles of Incorporation, certified by the Secretary of State of Missouri, and of the Corporation's By-laws, certified by the Corporation's Secretary, shall be delivered to the Buyer all true, complete and correct, as of the date of closing;

(b) *Capitalization:* That the Corporation's entire authorized capital stock now consists of and will consist of, as of the date of closing, 10,000 shares of common stock par value $1.00 each and 150 shares 6% non-voting stock of par value $100.00 each; that all such shares are validly issued, outstanding, fully paid and non-accessible;

(c) *Stock Ownership*: That the Seller is now and will be at the date of closing the owner, free and clear of any encumbrances, of the shares of stock of the Corporation to be sold hereunder, being all the issued and outstanding shares of the capital stock of the Corporation;

(d) *Assets*: That as of the date of closing the Corporation will own and control, free and clear of all liens and encumbrances of any nature whatsoever, the assets set forth on Schedule A attached hereto and by this reference incorporated herein;

(e) *Absence of Liabilities*: That as of the date of closing the Corporation will have no liabilities, except with respect to its capital stock to be sold hereunder;

(f) *Covenants Not to Compete*: That the Seller shall not solicit, negotiate, write or place or aid in any manner in soliciting, negotiating, writing or placing of any group accident or health insurance on public school employees in the States of Kansas or Missouri for a period of five years from the date hereof without the written consent of the Buyer; provided, however, that the Buyer hereby expressly consents to any solicitations or negotiations by the Seller of any business placed with or through the Buyer or the Corporation.

(5) *REPRESENTATIONS, WARRANTIES AND COVENANTS OF BUYER*: The Buyer represents, warrants and covenants for a period of ten years from the day hereof as follows:

(a) *Liquidation and Dissolution*: That the Buyer will not permit the Corporation to be liquidated or dissolved, without the prior written consent of the Seller;

(b) *Distributions and Dividends*: That the Buyer will not permit the Corporation to make liquidating distribution of capital, either partial or complete, nor any dividends out of capital surplus or paid-in surplus, without the prior written consent of the Seller;

(c) *Inspection of Books*: That the Seller, or her agents, shall at all reasonable times have the right to inspect the books and records of the Corporation, provided reasonable notice shall be given;

(d) *Sale of Stock*: That the Buyer will not sell, assign, transfer, pledge, hypothecate or otherwise encumber the stock in the Corporation to be purchased hereunder, without the prior written consent of the Seller.

(e) *Insurance Business*: That the Buyer will not permit the Corporation to place any insurance business with any insurance company other than the Continental Casualty Company of Chicago, Illinois, if Continental writes such insurance business; that the Buyer will not personally engage in any insurance business except through the Corporation; and that the Buyer will not purchase or otherwise acquire any interest in any other insurance business.

(f) *Sale of Assets*: That the Buyer will not permit the Corporation to sell, lease, mortgage or otherwise encumber its assets, without the prior written consent of the Seller.

(6) *ASSIGNMENT*: No assignment of this Agreement by either party shall be valid without the written consent of the other party.

(7) *BENEFIT*: This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their legal representatives, heirs and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate the day and year first above written.

/s/ Ruth J. Rubel Jones
Seller
/s/ Forrest T. Jones
Buyer

DEFENDANT'S EXHIBIT D

Amendment to Agency Contracts and Commission Agreements

THIS AGREEMENT, made and entered into as of the 31st day of August, 1953, by and between *RUTH J. RUBEL AGENCY, INC.*, a Missouri corporation, hereinafter referred to as "Agency" and *"CONTINENTAL CASUALTY COMPANY*, an Illinois corporation, hereinafter referred to as "Company",

WITNESSETH:

WHEREAS, the Agency and the Company did on the 20th day of August, 1953, enter into a written agreement to assignment of the Agency contracts and commission agreements detailed in Paragraph (1) hereinafter, and

WHEREAS, Paragraph (3) of such document provides as follows:

> This agreement by the Company is on the express representation that Ruth J. Rubel Jones is the owner of at least 90% of the issued stock of the Agency. In the event that said Ruth J. Rubel Jones should dispose of her stock, or sufficient thereof to reduce her ownership to less than 90% of all issued stock, *or* in the event that Ruth J. Rubel Jones should cease to be in active charge and direction of the Agency so that the Company is not receiving, through the Agency, the benefits of her

experience, contacts and abilities, then at the request of the Company the Agency will execute an amendment to each of said contracts and agreements reducing by five (5) percentage points all commissions payable under each such contract and agreement, and

WHEREAS, said Ruth J. Rubel Jones has sold and transferred to Forrest T. Jones all of her stockholdings in Ruth J. Rubel Agency, Inc.,

NOW THEREFORE, in consideration of the premises and the mutual consideration flowing from each party to the other, the sufficiency and receipt of which is hereby acknowledged by each party, it is agreed as follows:

(1) Effective September 1, 1953, the following Agency contracts and commission agreements are each modified and amended by deleting each commission percentage figure therein and inserting in lieu of the figure so deleted, that figure which is five (5) percentage points lower:

1. A General Agent contract under the Commercial Division dated July 25, 1946 providing the following commission provisions:

Accident only policies	35%
Health only policies	30%
Combination A & H"	33 1-3%
Hospital policies	33 1-3%

2. A General Agent contract with the Non-Cancellable Accident Division, Accident and Health Department, dated July 25, 1946, providing for payment of a 30% commission on premiums paid to the company for 10 years with respect to each policy issued thereunder, and for payment of a 15% collection fee after the 10th year on such policy premiums collected and paid to the Company.

3. A General Agent contract with the Disability Division whereby the Company agrees to pay a renewal

commission of 32½% plus all of the 1st month premium, plus all of any policy fee.

4. Special commission contracts on Group Insurance written under the Association Group Division of the Accident and Health Department as listed below:

   A. Kansas City Missouri Teachers Group Policy No. 1-G-3719

   B. Kansas City Missouri Custodians and Repairmens' Group Accident Policy No. 1-G-1590

   C. Kansas City Missouri Custodians and Repairmens' Group Sickness Policy No. 2-G-1590

   D. Kansas City Kansas Teachers Group Policy No. 2-G-3719 & A

   E. Springfield Missouri Teachers Group Policy No. 1-G-6819 & A

   F. Springfield Missouri Custodians Group Policy No. 1-G-6890

   G. St. Louis Missouri Teachers Group Policy No. 5-G-6919

   H. Missouri State Teachers Association Group Policy No. 1-G-5019

   I. Northeast Johnson County, Kansas Teachers Group Policy No. 2-A-3619

(2) By way of explanation of Paragraph (1), if the commission figure heretofore existing in a certain contract was 22½%, the new figure shall be 17½%; if the old figure was 20%, the new figure shall be 15%, etc.

Ruth J. Rubel Agency, Inc.
By: /s/ Forrest T. Jones
Vice-President
Continental Casualty Company
By: /s/ Signature illegible
Title: Vice President

Approved:
/s/ Ruth J. Rubel Jones
individually

DEFENDANT'S EXHIBIT E

Agreement

THIS AGREEMENT, made and entered into this first day of September, 1953, by and between CONTINENTAL CASUALTY COMPANY, an Illinois corporation having its principal place of business at 310 South Michigan Avenue, Chicago, Illinois, hereinafter called "Continental" and RUTH J. RUBEL JONES of 5311 Mission Woods Terrace, Kansas City, Kansas, hereinafter called the "Agent",

WITNESSETH:

WHEREAS, the Agent has for many years represented Continental as agent in soliciting and placing Teachers' Group Insurance, and

WHEREAS, the Agent has sold all her interest in said agency, and

WHEREAS, Continental desires to have available for a future period the services of the Agent as a consultant on matters of Teachers' Group Insurance, and the Agent desires to so serve Continental, and

WHEREAS, the parties have carried on negotiations leading toward this Agreement and deem it advisable to reduce the same to this writing,

NOW THEREFORE, the parties hereto do agree as follows:

1. For a period of ten years from the date hereof, the Agent agrees to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group Insurance as shall be requested by Continental. In the performance of the aforesaid services the parties hereto do ex-

pressly agree that the Agent shall at all times be acting in the capacity of independent contractor and not as employee of Continental.

2. Continental agrees to retain the services of the Agent in the manner and upon the terms and for the period set forth in Paragraph 1 of this Agreement. Continental further agrees to pay to the Agent for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc., said sum to be paid on or before the 15th day of each month covering the preceding calendar month. Such payments shall be accompanied by copies of the remittance invoices submitted to Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc. The sums herein agreed to be paid by Continental shall continue to be paid regardless of the Agent's inability or incapacity to fulfill her obligations hereunder stated and regardless of her death, provided that such obligations have been satisfactorily performed by the Agent for a period of two years from the date hereof and prior to any such inability, incapacity or death. Such sums shall be paid to the Agent, if living, and if deceased, to her personal representatives.

3. Nothing herein contained shall be construed as preventing the Agent from engaging in any other business activities, nor as requiring said Agent to do more than be available for consultation with designated representatives of Continental at reasonable times and places.

4. This Agreement shall terminate ten years from the date hereof but may be terminated prior thereto at any time by mutual consent of Continental and the Agent.

5. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their successors, personal representatives, heirs and assigns.

IN WITNESS WHEREOF, Continental has caused this Agreement to be duly executed by its authorized representative and the Agent has duly executed this instrument the day and year first above written at Chicago, Illinois.

Continental Casualty Company
By /s/ Signature illegible
Authorized Representative
/s/ Ruth J. Rubel Jones

DEFENDANT'S EXHIBIT F

Agreement

THIS AGREEMENT, made and entered into this first day of September, 1953, by and between RUTH J. RUBEL JONES, of Kansas City, Kansas, hereinafter called the "First Party", and FORREST T. JONES, of Chicago, Illinois, hereinafter called "Second Party",

WITNESSETH:

WHEREAS, First Party has sold all of her interest in the Ruth J. Rubel Agency, Inc., an insurance agency, to Second Party, and

WHEREAS, Second Party recognizes that First Party would not have sold said insurance agency to Second Party had not Continental Casualty Company of Chicago, Illinois, simultaneously entered into an agreement with First Party to pay First Party, or the personal representatives of her estate, for consultation services to be rendered by First Party, a sum equal to 5% of the premiums of all insurance written through Continental by Forrest T. Jones or Ruth J. Rubel Agency, Inc., for a period of ten years, and

WHEREAS, Second Party has represented and warranted to First Party that the aforesaid sum to be paid by

Continental will equal at least $15,000.00 per year for said ten-year period, and

WHEREAS, Second Party is willing to indemnify First Party in the event said percentage of premiums paid by Continental to First Party does not equal $15,000.00 per year, all as hereinafter more fully appears,

NOW THEREFORE, the parties hereto do covenant and agree as follows:

1. Second Party covenants and agrees that if the amount First Party shall receive under their aforementioned agreement with Continental does not equal $15,000.00 for the first twelve-month period of the term of the Continental agreement, then Second Party shall pay the deficit amount to the First Party within sixty (60) days after the end of said twelve-month period. Likewise, Second Party agrees that during any subsequent twelve-month period if the sum paid to First Party under the Continental Agreement does not equal $15,000.00 for the immediately preceding twelve-month period, then Second Party shall pay the deficit amount thereof to the First Party within sixty (60) days after the end of said twelve-month period.

2. When any sums shall be due First Party by Second Party under the terms of paragraph 1 of this Agreement, the First Party hereby agrees in consideration of said payments, to perform consultation services on Teachers' Group Insurance matters for Second Party as shall be requested by Second Party.

3. Nothing herein contained shall be construed as preventing First Party from engaging in any other business activities nor as requiring the First Party to do more than be available for consultation with Second Party at reasonable times and places, with due consideration for the then health and capacity of the First Party.

4. A true copy of the agreement between First Party and Continental Casualty Company is attached hereto and by this reference is incorporated herein.

5. If Second Party shall fail to carry out any of the covenants and agreements on his part herein contained, or if Second Party shall be required to make deficit payments to First Party as hereinbefore provided for three consecutive years, then the parties hereto do expressly agree that this instrument shall constitute an option by Second Party to First Party to purchase all of the capital stock of the Ruth J. Rubel Agency, Inc., or its successors for the sum of $1.00.

6. This agreement shall be binding upon and shall inure to the benefit of parties hereto, their personal representatives, heirs and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

/s/ Ruth J. Rubel Jones
First Party
/s/ Forrest T. Jones
Second Party

DEFENDANT'S EXHIBIT G

Amendment to Agreement of Sale

THIS AMENDMENT TO AGREEMENT OF SALE, made and entered into this 24th day of August, 1956, by and between RUTH J. RUBEL JONES, Kansas City, Kansas, hereinafter called the "Seller" and FORREST T. JONES, Kansas City, Missouri, hereinafter called the "Buyer",

WITNESSETH:

WHEREAS, the Seller and the Buyer under date of August 29, 1953 did enter into and execute a certain Agreement of Sale whereby the Seller sold to the Buyer all issued and outstanding capital stock, including common and preferred, of Ruth J. Rubel Agency, Inc., a Missouri corporation, and

WHEREAS, Paragraph 2 of said Agreement of Sale of August 29, 1953 recited that the purchase price for all of said capital stock purchased under said agreement was the sum of Twenty-Five Thousand Dollars ($25,000.00), and

WHEREAS, it has now been discovered that said recitation was incorrect in that the purchase price was the sum of Fifty Thousand Dollars ($50,000.00), and

WHEREAS, the parties, due to the discovery of this error, deem it advisable to correct the mistake in the recitation in Paragraph 2 thereof of the purchase price to conform with the actual agreement of the parties,

NOW THEREFORE, the parties hereto, in consideration of the premises, do mutually covenant and agree that Paragraph 2 of their Agreement of Sale of August 29, 1953 be corrected to read as follows:

> (2) *PURCHASE PRICE AND METHOD OF PAYMENT*: The aggregate purchase price to be paid by the Buyer to the Seller for the stock, particularly described in Paragraph 1 of this Agreement, shall be the sum of Fifty Thousand Dollars ($50,000.00), to be paid in cash at the time hereinafter specified.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate the day and year first above written.

/s/ Ruth J. Rubel Jones
Seller
/s/ Forrest T. Jones
Buyer

APPENDIX H

Requested Instruction No. 7

You are instructed that a going business such as that sold by Mrs. Ruth Rubel Jones to Forrest Jones consists of tangible assets such as furniture, fixtures, files, etc., and certain intangible assets such as rights under contracts and good will. In this regard "good will" is nothing more or less than the probability that old customers will resort to the old place of business and all that good disposition with customers toward the house of business which may induce them to continue their connection with it.

This term "good will" includes all of the symbols and other attractions which invoke a favorable response to the customers and also includes, in the negative sense, removing the seller or transferor of the business as an alternative attraction to them. Good Will is a capital asset. Payments made to acquire the good will or to suppress or eliminate competition are payments made for the acquisition of a capital asset. It makes no difference that the payments may have been termed "commission" or were for a variable amount geared to gross income instead of net profit.
Ernest B. White 63,017 PH Memo TC; TC Memo 1963-17
Falstaff Beer, Inc. 37 TC 451

Ed. V. Price and Co. Ensign Bo BTA Memo 63041 Neuberger 13TC232

Research Institute Tax Coordinator Par. L2807, 2808 and 2811

Merten Law Federal Income Taxation, Volume 4, Par. 25.1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1390

JOHN PAUL JONES AND RUTH J. RUBEL JONES,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The ultimate question in this case is the proper characterization—as ordinary income or capital gain—of payments petitioner [1] received under an agreement she entered into with Continental Casualty Company at the time she entered into another agreement to sell all the stock in her corporate insurance agency to Forrest T. Jones.[2] Under her contract with Continental, petitioner agreed to serve for ten years, on request, as a consultant to Continental in the solicitation and

[1] "Petitioner" refers to Ruth J. Rubel Jones. Her husband, John Paul Jones, is a party to this litigation solely because they filed joint returns.

[2] The $50,000 received under the latter agreement is conceded to be capital gain.

807-992—68

underwriting of teachers' group insurance. Continental agreed to pay petitioner five per cent of premiums on any insurance written through Continental by Forrest T. Jones or the agency he purchased from petitioner.

In a timely suit for refund, a jury rejected petitioner's argument that the agreement with Continental implemented the sale of her agency and provided for additional payments of purchase price, finding instead that the payments were for services that petitioner rendered or agreed to render to Continental. The court of appeals affirmed, holding (Pet. A5) that the evidence supports the jury's verdict, and rejecting petitioner's contentions that the trial judge had committed reversible error in excluding proffered exhibits and testimony and in refusing to give a requested instruction.

There is no basis for further review. The issues on which petitioner now focuses—whether her agreement with Continental was in reality a covenant not to compete, and if so, whether the courts could apportion part of her receipts to such a covenant—were not raised at trial or on appeal. Those contentions are in any event based upon a factual assumption—that Continental's

payments constituted part of the purchase price for her stock—that the jury rejected.[3]

The only question tendered here that was raised below is (Pet. 27–29) whether the trial court erred in declining to instruct the jury on the possibility that Continental's payments were for goodwill. As the court of appeals held (Pet. A7–A8), the record was without an adequate evidentiary basis for such an instruction, and even now petitioner points to none.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
GRANT W. WIPRUD,
MICHAEL B. ARKIN,
Attorneys.

MAY 1968.

[3] There was a covenant not to compete in petitioner's agreement with Forrest T. Jones (Pet. A36). The Commissioner did not contend that any part of the $50,000 paid for petitioner's stock should be apportioned to this covenant. Contrary to the legal theories in the petition, however, such an allocation would have been appropriate, if the evidence showed the covenant had distinct value. *E.g.*, *Annabelle Candy Co.* v. *Commissioner*, 314 F. 2d 1 (C.A. 9). The cases cited in the petition are not in conflict with this proposition. They simply apply it to different records, either sustaining or rejecting such an allocation, according to the facts of the particular cases.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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SUPREME COURT, U. S.

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JUN 7 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1390

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

WALTER A. RAYMOND and
KENNETH C. WEST,
1030 Commerce Tower,
911 Main Street,
Kansas City, Missouri,
Counsel for Petitioners.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1390

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

Petitioners respectfully submit the following reply brief.

On page 3 of the Government's Memorandum in Opposition it is stated:

> "The only question tendered here that was raised below is (Pet. 27-29) whether the trial court erred in declining to instruct the jury on the possibility that Continental's payments were for good will."

That statement shows a complete misunderstanding of Petitioners' position in this proceedings. The basic and major premise of this Petition is conflict of opinion between the opinion and judgment of the Tenth Circuit Court of

Appeals herein and other Circuit Courts of Appeal on the several issues presented. Under each heading we have cited cases from other Circuits which we claim to be in conflict with the opinion herein. Conflict of opinions within the Circuits is a productive source of litigation before this Court.

In the case of *Charles Dowd Box Company* v. *Courtney*, 82 S. Ct. 519, the Court said (l.c. 526):

> "[6] It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which Lincoln Mills spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this court."

In the case of *United States* v. *Zacks*, 375 U.S. 59, 61, 84 S. Ct. 178, the Court said (l.c. 179):

> "[2] Because of the recurring importance of the problem in the administration of the tax laws and a conflict between the decision below and those of some of the Courts of Appeals, we granted certiorari. 371 U.S. 961, 83 S. Ct. 543, 9 L. Ed. 2d 509."

In the case of *C. I. R.* v. *Hansen*, 360 U.S. 446, 450, 79 S. Ct. 1270, the Court said (l.c. 1273):

> "Because of an asserted conflict between those circuits in these cases, and between other circuits on the question involved, and because of the importance of the question to the proper administration of the revenue laws, we granted certiorari in all three cases."

In the case of *United States* v. *Cannelton Sewer Pipe Company*, 364 U.S. 76, 78, 80 S. Ct. 1581, the Court said (l.c. 1582):

> "In view of the importance of the question to taxpayers as well as to the Government, we granted certiorari. 361 U.S. 923, 80 S. Ct. 294, 4 L. Ed. 2d 239."

In the case of *Knetsch* v. *United States*, 364 U.S. 361, 362, 81 S. Ct. 132, the Court said (l.c. 133):

> "Because of a suggested conflict with the decision of the Court of Appeals for the Fifth Circuit in United States v. Bond, 258 F.2d 577, we granted certiorari 361 U.S. 958, 80 S. Ct. 589, 4 L. Ed. 2d 541."

The many opinions we have examined where the jurisdiction of this Court was based on conflict of opinion between the Circuits, the Court have not appeared to investigate or consider whether the alleged conflict was raised below or how it was raised.

We believe there is a reason for that; that an erroneous opinion of a Circuit in conflict with opinion of another Circuit is capable of doing about as much damage to the uniformity of decision in the way of "diversities and conflicts" as one based on the most technically perfect record below.

We therefore submit the issue of the various conflicts of opinion in this Petition are properly before this Court for consideration and ruling on the merits.

The Government's brief states (pp. 2-3) that the jury rejected Petitioners' claim that "Continental's payments constituted a part of the purchase price" and that ended the matter. Under the law as pointed out in our Petition, pages 12 and 13, the sale of a business is to be treated "not as a unit, but as an aggregation of its assets." The Trial

Court erroneously treated this sale of Petitioners' business as a unit and gave the jury no opportunity to fragment it, thereby conflicting with numerous decisions of other Circuits, some of which are mentioned on pages 12 to 16 and 27 to 28 of the Petition herein.

In the footnote on page 3 the Government takes the position that allocation would have been appropriate "if the evidence showed the covenant had distinct value."

There was no dispute in the record as to the covenant having "distinct value", but on the contrary the undisputed evidence shows it had great value.

Mr. Mel Smith, the then vice president of the Continental Casualty Company testified (Tr. 878):

"'ANSWER: The purchase price was to be $50,000.

'QUESTION: What other considerations were there to induce the sale?

'ANSWER: Well, I warned Fisher early in his negotiation that we had to protect the company's business because I didn't trust Mrs. Rubel, so I warned him to get an agreement which would prevent her from switching that business.'"

(Tr. 880:)

"'QUESTION: That consultation agreement was executed by Continental to preserve the business that was being written by her agency to retain her loyalty and to also provide for her future services if needed, is that not correct?

'ANSWER: Yes.'"

(Tr. 626;)

"'QUESTION: And what services did you expect to receive out of Mrs. Rubel?

'ANSWER: Well, I wasn't so concerned about the services as I was—I was not concerned on the

positive side, I was concerned on the negative side. I was concerned what she would do to destroy the business rather than what she would do to preserve it.'"

(Tr. 627:)

"'QUESTION: What were you concerned about with respect to Continental?

'ANSWER: Well, the nature of this business is such that the person who creates it has control over it, so that if that person desires to place it with another company, it's not a difficult job for them to accomplish it.

'QUESTION: You have testified earlier, I believe, that this was a profitable book of business so far as Continental was concerned?

'ANSWER: Yes, it was.

'QUESTION: And when you said you were concerned about Continental you wanted to make sure that book of business stayed with Continental?

'ANSWER: That is true.'"

Such testimony also shows the good will of this business also had great value and the trial court erred in refusing to permit the jury to fragment the purchase price and fix the value of the good will.

The trial court and Court of Appeals erred as a matter of law in holding the five per cent agreement with Continental Casualty Company was an independent contract and not part of a single business transaction made up of several instruments all tied together and all part of the one transaction.

Please note the dates of the several instruments:

Exhibit A—August 19, 1953.

Exhibit B—August 20, 1953.

Exhibit C—August 29, 1953.

Exhibit D—August 31, 1953.

Exhibit E (the 5% agreement)—September 1, 1953.

Exhibit F (Agreement between the seller and buyer dated September 1, 1953) stating as follows: Exhibit F, Appendix G (pages A43 and A45):

"WHEREAS, First Party has sold all of her interest in the Ruth J. Rubel Agency, Inc., an insurance agency, to Second Party, and

WHEREAS, Second Party recognizes that First Party would not have sold said insurance agency to Second Party had not Continental Casualty Company of Chicago, Illinois, simultaneously entered into an agreement with First Party to pay First Party, or the personal representatives of her estate, for consultation services to be rendered by First Party, a sum equal to 5% of the premiums of all insurance written through Continental by Forrest T. Jones or Ruth J. Rubel Agency, Inc., for a period of ten years, and

* * *

"4. A true copy of the agreement between First Party and Continental Casualty Company is attached hereto and by this reference is incorporated herein."

We submit the recurring importance of the problem in the administration of the tax laws relating to the many thousands of sales of businesses calls for review by this Court and its authoritative adjudication.

We therefore pray, in accordance with our petition, that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Tenth Circuit to the end that this cause may be reversed.

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